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No. 00-_____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

DOUGLAS L. PATCH, BRUCE B. ELLSWORTH, and SUSAN S. GEIGER

Petitioners,

v.

CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

Where a utility has the legal right to refuse to make wholesale power purchases under a FERC-approved rate schedule, and a state public utility commission determines that continued purchases under the schedule would be imprudent, does the Johnson Act prohibit federal district court review of the imprudence determination?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

Facts and Procedural History of the Case 2

REASONS FOR GRANTING THE WRIT 6

I. The First Circuit Erred When It Failed To Find That The Johnson Act Barred The District Court's Injunction Where, As A Matter Of Law, No Conflict Or Inconsistency Exists Between the NHPUC's Disallowance Order And The FERC-Approved RS-2 Rate Schedule 9

A. The Termination Clause In The RS-2 Rate Schedule Allowed The NHPUC To Find CVEC Imprudent For Continuing To Purchase Power From CVPS 12

1. The *Narragansett* or "Filed Rate" Doctrine....12

2. The *Pike County* Exception....14

3. CVEC Has The Legal Right To Refuse To Buy Power From CVPS....15

B. There Is No Conflict Or Inconsistency Between the NHPUC's Disallowance Order and the RS-2 Rate Schedule Because FERC Does Not Have Jurisdiction Over the NHPUC's Imprudence Determination....18

1. FERC Does Not Have Jurisdiction Over Imprudence Reviews....18

2. FERC's Jurisdictional Boundaries And The Johnson Act Combine To Limit District Court Review of State Imprudence Determinations....21

CONCLUSION....28

TABLE OF AUTHORITIES

Cases

Appeal of Sinclair Machine Products, Inc.,
126 N.H. 822, 498 A.2d 696 (1985) 16, 20

California v. Grace Brethren Church,
457 U.S. 393 (1982) 6, 11, 12

Hanna Mining Co. v. Minn. Power & Light Co.,
739 F.2d 1368 (8th Cir. 1984) 11

Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F.2d 600 (3rd Cir.), *cert. denied*,
488 U.S. 941 (1988) ..... *passim*

Mississippi Power & Light Co. v. Mississippi,
487 U.S. 354 (1988) ..... *passim*

Nantahala Power & Light Co. v. Thornburg,
476 U.S. 953 (1986) 7, 13, 14

Narragansett Elec. Co. v. Burke, 381 A.2d 1358
(R.I. 1977), *cert. denied*, 435 U.S. 972 (1978) 12, 13

New Orleans Pub. Serv., Inc. (NOPSI IV) v. Council of City of New Orleans, 911 F.2d 993, (5th Cir. 1990), *cert. granted*, 494 U.S. 974,
cert. dismissed, 502 U.S. 954 (1991) ..... *passim*

Pike County Light and Power Co. v. Pennsylvania Public Utility Commission,
465 A.2d 735 (Pa. Commw. Ct. 1983) ..... *passim*

Public Serv. Co. of New Hampshire v. Patch,
136 F.3d 197 (1st Cir. 1998).....4

Public Serv. Co. of New Hampshire v. Patch,
167 F.3d 15 (1st Cir. 1998).....4

Public Serv. Co. of New Hampshire v. Patch,
167 F.3d 29 (1st Cir. 1998), *cert. denied*,
526 U.S. 1066 (1999).....*passim*

Public Serv. Co. of New Hampshire v. Patch,
173 F.R.D. 17 (D.N.H. 1997).....4

Public Serv. Co. of New Hampshire v. Patch,
202 F.3d 29 (1st Cir. 2000).....*passim*

Public Serv. Co. of New Hampshire v. Patch,
221 F.3d.198 (1st Cir. 2000).....*passim*

Public Serv. Co. of New Hampshire v. Patch,
87 F.Supp.2d 57 (D.N.H. 2000).....*passim*

Public Serv. Co. of New Hampshire v. Patch,
962 F. Supp. 222 (D.N.H. 1997).....4

Tennyson v. Gas Service Co., 506 F.2d 1135
(10th Cir. 1974).....10

U.S. West Inc. v. Tristani, 182 F.3d 1202
(10th Cir. 1999).....10

Statutes

28 U.S.C. § 1254(1).....1

28 U.S.C. § 1342.....1, 6

Agency Orders

Federal Energy Regulatory Commission

Central Vermont Pub. Serv. Corp., 81 F.E.R.C. (CCH) ¶ 61,336 (1997), *rehearing denied*, 84 F.E.R.C. (CCH) ¶ 61,295 (1998) 17

Central Vermont Pub. Serv. Corp., 84 F.E.R.C. (CCH) ¶ 61,194 (1998) 15, 16, 17

Central Vermont Pub. Serv. Corp., 84 F.E.R.C. (CCH) ¶ 61,194 (1984) 13, 14

Doswell Limited Partnership, 50 F.E.R.C. (CCH) ¶ 61,251 (1990) 19, 20

Pennsylvania Power & Light, 23 F.E.R.C. (CCH) ¶ 61,325 (1983) 18, 19

Southern Company Services, Inc., 28 F.E.R.C. (CCH) ¶ 61,349 (1984) 19

New Hampshire Public Utilities Commission

Connecticut Valley Elec. Co., 71 NHPUC 145 (1986) 3

Re Concord Electric Company, 69 NHPUC 701 (1984) 3

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners respectfully petition this Court to issue a writ of *certiorari* to the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 221 F.3d 198 (1st Cir. 2000). (Appendix at p. 1, hereinafter "App. ___"). The opinion of the District Court is reported at 87 F.Supp.2d 57 (D.N.H. 2000). App. 13.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on July 25, 2000. On August 28, 2000, the Court of Appeals denied petitioners' timely petition for rehearing. App. 30. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Johnson Act, 28 U.S.C. § 1342, provides in pertinent part:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and

(2) The order does not interfere with interstate commerce; and

(3) The order has been made after reasonable notice and hearing; and

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

STATEMENT OF THE CASE

Facts and Procedural History of the Case

Connecticut Valley Electric Company ("CVEC"), a small retail electric distribution company in New Hampshire, purchases most of the power needed to serve its approximately 10,000 retail customers from its parent, Central Vermont Public Service Corporation ("CVPS"). These purchases are made under a wholesale contract, denominated the RS-2 Rate Schedule, filed with and approved by the Federal Energy Regulatory Commission ("FERC"). CVEC has purchased power from CVPS under the RS-2 Rate Schedule since 1983. In addition to provisions regarding the pricing and other terms of the delivery of electricity, the RS-2 Rate Schedule provides, under Section E, entitled "Termination":

> Service under this Rate Schedule may be terminated at any time if both the Company and the Customer agree to the termination. If there is no agreement, service may be terminated at the end of a service year if the party seeking termination has given written

> notice of termination prior to the beginning of that service year.

App. 82.

The Petitioners are the Chairman and Commissioners of the New Hampshire Public Utilities Commission ("NHPUC"). Pursuant to its authority under New Hampshire law, the NHPUC first reviewed CVEC's participation in the RS-2 Rate Schedule in 1986. In its order initially approving the prudence of CVEC's purchases under the RS-2 Rate Schedule, the NHPUC stated:

> Our findings and conclusions in this proceeding will not necessarily be the same in future dockets. The terms of the RS-2 tariff provide that CVEC may terminate the arrangement on one calendar year's notice.[n4]
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> ---
>
> [n4]The Commission has previously provided that it favors power supply arrangements which will allow the Commission to review periodically the decisions of the regulated distribution company. *Re Concord Electric Company*, 69 NHPUC 701, 705, 706 (1984). The one year termination provision in the CVPS RS-2 rate satisfies the Commission's concern in this area.

Connecticut Valley Elec. Co., 71 NHPUC 145, 147 (1986).

In late 1997, the City of Claremont, New Hampshire, where the majority of CVEC's retail customers reside, filed a complaint with the NHPUC alleging that CVEC's continued purchase from CVPS was imprudent. Shortly thereafter,

CVEC submitted its annual purchased power cost adjustment and fuel adjustment clause filing to the NHPUC, seeking an increase in retail power rates due to an increase in purchased power and fuel costs. At a duly noticed hearing of both matters, the NHPUC considered evidence showing that CVEC could have terminated the RS-2 Rate Schedule and purchased power from entities other than CVPS at substantially lower costs. The NHPUC entered an order (the "Disallowance Order") freezing CVEC's retail rates at their December 31, 1997 level based on its initial finding that CVEC was imprudent for not terminating the purchases under the RS-2 Rate Schedule and set the matter for further hearings. App. 109.

CVEC and CVPS moved the District Court for a preliminary injunction mandating the rate increase then proposed by the companies but disallowed by the NHPUC. The District Court entered an injunction requiring that the NHPUC allow CVEC's proposed higher rates to go into effect. App. 32. The NHPUC appealed the injunction, which the First Circuit vacated on December 3, 1998, App. 35, finding that CVEC's showing on the merits failed to present a "fair ground for further litigation. . . ." *Patch* V at 36;[1] App. 49. This Court denied certiorari. App. 51.

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[1] The shorthand utilized in the First Circuit's decisions is adopted herein. *Public Serv. Co. of New Hampshire v. Patch*, 962 F. Supp. 222 (D.N.H. 1997) (*Patch I*); *Public Serv. Co. of New Hampshire v. Patch*, 173 F.R.D. 17 (D.N.H. 1997) (*Patch II*); *Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197 (1st Cir. 1998) (*Patch III*); *Public Serv. Co. of New Hampshire v. Patch*, 167 F.3d 15 (1st Cir. 1998) (*Patch IV*); *Public Serv. Co. of New Hampshire v. Patch*, 167 F.3d 29 (1st Cir. 1998) (*Patch V*), *cert. denied*, 526 U.S. 1066 (1999); *Public Serv. Co. of New Hampshire v. Patch*, 202 F.3d 29 (1st Cir. 2000) (*Patch VI*); *Public Serv. Co. of New Hampshire v. Patch*, 87 F.Supp.2d 57 (D.N.H. 2000) (*Patch VII*); *Public Serv. Co. of New Hampshire v. Patch*, 221 F.3d.198 (1st Cir. 2000), *Patch VIII*.

After the First Circuit mandate became effective, NHPUC issued an order that required CVEC to refund the difference between the amount it collected from ratepayers in 1998 and the lesser amount it would have collected but for the vacated injunction. App. 74. On April 7, 1999, the district court ordered that the NHPUC was prohibited from requiring CVEC to refund those amounts. App. 52. Again, the NHPUC appealed to the First Circuit the injunction against the NHPUC-ordered refund.

The First Circuit found that the district court lacked a jurisdictional basis to enter its preliminary injunction. However, instead of reversing the new preliminary injunction, the court suspended the effect of its decision for a period of ninety days to give the district court an opportunity to decide the merits of the parties' claims on pending cross motions for summary judgment on this and other issues. App. 56.

On March 6, 2000, the district court issued its memorandum opinion and order granting a permanent injunction mandating that the NHPUC allow CVEC to pass through to its retail customers the increases previously disallowed by the NHPUC. In its ruling, the district court reviewed the NHPUC's imprudence finding and determined that the NHPUC's Disallowance Order was preempted because it was not "sincerely...based on an imprudence determination." *Patch* VII at 64; App. 27. The district court apparently reached this conclusion by interpreting another NHPUC order issued July 22, 1998, in a separate docket, which was unrelated to the imprudence determination, as *prohibiting* CVEC from terminating the RS-2 Contract. *Patch* VII at 64; App. 27. NHPUC appealed.

This time, however, the First Circuit affirmed the district court, finding, upon review of the NHPUC's

imprudence determination, that termination of the RS-2 contract "apparently would be self-defeating." *Patch* VIII at 202; App. 9. In affirming the district court, the First Circuit also found that NHPUC lacked a "colorable objective justification" for the Disallowance Order. *Patch VIII* at 204; App. 11-12. The First Circuit apparently based its determination on the application by CVPS before the Federal Energy Regulatory Commission ("FERC") for an "exit fee." The exit fee would impose, subject to refund, a termination charge on CVEC if it cancelled its contract. The First Circuit found that the imposition of the exit fee, and the prospect of a "potentially heavy financial penalty" caused the NHPUC's prior justification for disallowing the pass-throughs to "evaporate[]." *Patch* VIII at 202; App. 9.

REASONS FOR GRANTING THE WRIT

This case turns on the issue of whether the Johnson Act, 28 U.S.C. § 1342, precludes federal district courts from granting injunctive relief in a special category of cases: where a utility has the legal right to refuse to make wholesale power purchases under a rate schedule approved by FERC, and a state public utility commission ("state commission") determines that continued purchases under the FERC-approved schedule are imprudent.

The Congressional intent behind the Johnson Act is clear and unequivocal. As noted by this Court, "[t]he legislative history of the Johnson Act makes clear that its purpose was to prevent public utilities from going to federal district court to challenge state administrative orders or avoid state administrative and judicial proceedings." *California v. Grace Brethren Church*, 457 U.S. 393, 410 n.22 (1982); *id.* (citing Representative's statement that the purpose of the Johnson Act is "to withdraw completely from the district courts of the United States all jurisdiction in suits relating to

orders of State administrative boards or commissions affecting rates chargeable by public utilities."). Initially, then, it can be stated with certainty that a strong presumption exists against district court intervention in utility challenges to state commission conventional rate orders, such as prudence determinations, where, as here, a utility has the legal right to refuse to make wholesale power purchases under a FERC-approved rate schedule.

However, courts have consistently identified one exception to this broad jurisdictional bar: "[T]he Johnson Act does not bar injunctions against a state rate order . . . where the order is found to be inconsistent with a federal statute or federal agency determination." *Patch V*, 167 F.3d at 33 (citing cases); App. 43. While the NHPUC does not dispute the existence of this exception, one thing is clear beyond doubt--this exception is not present here, because there is no possible conflict between NHPUC's imprudence Order and the FERC-approved RS-2 Rate Schedule or any other FERC determination.

The reason for this absence of conflict lies in the connection between the jurisdictional boundaries set forth by Congress in the Johnson Act, and the jurisdictional boundaries delineated by this Court in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) and *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), and appropriately applied in the express holdings of the Third Circuit in *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988) and the Fifth Circuit in *New Orleans Pub. Serv., Inc. (NOPSI IV) v. Council of City of New Orleans*, 911 F.2d 993, 1005 (5th Cir.), *cert. granted*, 494 U.S. 974, *cert. dismissed*, 502 U.S. 954 (1991). These decisions compel the conclusion that the mere existence of a FERC-approved rate schedule does not automatically bar a state commission from

making a prudence determination. In situations where, as here, a state utility has the legal right to refuse to make wholesale power purchases under a FERC-approved schedule, FERC's approval and the state commission determination occupy separate jurisdictional spheres. Because of this jurisdictional divide, ***necessarily***, there is no conflict between the FERC rate schedule and the state commission prudency determination. Consequently, the district court and First Circuit were in fact ***without jurisdiction*** to review the results of the NHPUC's prudence determination because, in the absence of a conflict between the NHPUC's Order and the RS-2 rate schedule or any other FERC determination, the Johnson Act exception is inapplicable.

The possibility of FERC's approval of the imposition of an exit fee by CVPS if CVEC cancels the contract does not alter these jurisdictional boundaries. The exit fee applied for is subject to refund, has yet to be ruled on by FERC, and may well be denied entirely or set at a level significantly below that sought by CVPS. Most significantly, and for purposes of analysis under the Johnson Act, as the First Circuit previously determined, "nothing in the state commission's . . . order precludes FERC from imposing such a fee." *Patch V*, at 36; App. 49.

Notwithstanding the lack of conflict and the resulting absence of federal preemption, the First Circuit nevertheless affirmed the district court's granting of a permanent injunction mandating that the NHPUC allow CVEC to pass through to its retail customers its wholesale costs incurred under the RS-2 rate schedule. *Patch VIII*, 221 F.3d at 204; App. 11-12. In doing so, the First Circuit implicitly invalidated the NHPUC's imprudence determination, despite the fact that such a determination is totally within the jurisdictional province of the NHPUC. By upholding the district court, the First Circuit not only violated the clear

mandate of the Johnson Act, but also called into question the well-settled jurisdictional spheres of FERC and state commissions. Thus, its ruling simultaneously gutted long-standing protections for state utility commission rate orders and sanctioned federal court review of matters previously universally held to be in the exclusive purview of state commissions. Such a departure from well-settled jurisprudence was clearly not justified and was in error. As a result of its ruling, the First Circuit has placed itself in direct conflict with decisions by the Third Circuit in *Kentucky W. Va. Gas*, the Fifth Circuit in *NOPSI IV*, and with assumptions expressed by this Court in *Nantahala* and *Mississippi Power & Light* on this important jurisdictional matter.

Accordingly, the petitioners ask the Court to issue a writ of *certiorari* to review and reverse the decision of the United States Court of Appeals for the First Circuit.

I. The First Circuit Erred When It Failed To Find That The Johnson Act Barred The District Court's Injunction Where, As A Matter Of Law, No Conflict Or Inconsistency Exists Between the NHPUC's Disallowance Order And The FERC-Approved RS-2 Rate Schedule.

Courts have consistently found that in passing the Johnson Act,[2] Congress "intended to keep constitutional

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[2] The Johnson Act, 28 U.S.C. § 1342, provides that:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and

challenges to orders affecting rates out of the courts 'lock, stock, and barrel' or, as Professor Moore succinctly puts it, to effect a 'general hands-off policy relative to state ratemaking.'" *Tennyson v. Gas Service Co.*, 506 F.2d 1135, 1138 (10th Cir. 1974)(citations omitted); *U.S. West Inc. v. Tristani*, 182 F.3d 1202, 1207 (10th Cir. 1999)("The Johnson Act sought to remedy the evils of federal court interference with state control of its intrastate public utility rates."). This Court has itself acknowledged this intent, and even taken the unusual step of cataloging statements from various members of Congress as support:

> Rep. Mapes: "It is simply a question as to whether or not States are going to be allowed to perform their proper functions in the supervision and fixing of rates, without interference of Federal law. It is a question as to whether or not Congress is going to continue to permit the utilities in important cases to thwart the will of the States and the State authorities.... This bill will only deprive the lower Federal courts of the jurisdiction they now have over rate cases."
>
> Rep. Lewis: "The Johnson bill absolutely abolishes the jurisdiction of the United States courts in rate cases."

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(2) The order does not interfere with interstate commerce; and

(3) The order has been made after reasonable notice and hearing; and

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

> Rep. Tarver: "The Johnson bill contains but one substantive proposition, and that is to divest the district courts of the United States of jurisdiction in public-utility rate cases."
>
> Rep. Hancock: "[T]he Johnson bill seeks to [save time and money] by divesting the Federal courts of all jurisdiction in public-utility cases except the right of appeal to the Supreme Court of the United States after the final decision of the State court of last resort."

Grace Brethren Church, 457 U.S. at 410 n.22 (citations omitted). Thus, it is undeniable that a strong presumption exists against district court intervention in utility challenges to state rate orders. *See, e.g., NOPSI*, 911 F.2d at 1005 (noting that even the inapplicability of Johnson Act "does not diminish the federal interest in state court resolution of challenges to state rate orders."); *Hanna Mining Co. v. Minn. Power & Light Co.*, 739 F.2d 1368, 1370 (8th Cir. 1984)(noting that the Johnson Act is "to be broadly construed to keep challenges to orders affecting rates out of the federal courts.").

Notwithstanding the strong presumption against district court intervention in utility challenges to state rate orders, courts have consistently identified one exception to this broad jurisdictional bar that is arguably applicable to this case: "the Johnson Act does not bar injunctions against a state rate order . . . where the order is found to be inconsistent with a federal statute or federal agency determination." *Patch V*, 167 F.3d at 33 (citing cases); App. 43. Thus, the basic question before both the district court and the First Circuit was whether a conflict or inconsistency exists between the NHPUC Disallowance Order and the FERC-approved RS-2 Rate Schedule. If a conflict exists, the Johnson Act does not prohibit either court from exercising its jurisdiction and

determining that the NHPUC's prudence determination is *preempted. However, if no conflict exists, the courts should* have declined jurisdiction and left review of the NHPUC's prudence determination to the New Hampshire state courts, consistent with congressional intent. *See, e.g., Grace Brethren Church*, 457 U.S. at 410 n.22 (citing Representative's statement that under the Johnson Act a utility "will be required, in all cases where a State has set up a public utility commission, to proceed before that commission if it has any complaint. It can appeal from this State board to the State courts and, if it is dissatisfied with the final judgment of the supreme court of the State, it can take an appeal to the Supreme Court of the United States.").

As the following will show, no such conflict or inconsistency exists or could exist on these facts as a matter of law.

A. The Termination Clause In The RS-2 Rate Schedule Allowed The NHPUC To Find CVEC Imprudent For Continuing To Purchase Power From CVPS.

1. The *Narragansett* or "Filed Rate" Doctrine.

In this case, federal preemption is coextensive with, and grounded in, the *Narragansett,* or "filed rate" doctrine. *See, e.g., NOPSI IV*, 911 F.2d at 999 (noting that the utility's facial preemption claim was grounded in the filed rate doctrine). Under this doctrine, when FERC sets a rate for the sale of power to a wholesale purchaser, as it did with the RS-2 Rate Schedule, a state commission is preempted from substituting its own judgment about cost elements or "reasonableness," and then exercising its jurisdiction over retail rates to prevent the wholesale purchaser from recovering at retail the costs of paying the FERC-approved

rate. *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358, 1362 (R.I. 1977), *cert. denied*, 435 U.S. 972 (1978). *See Central Vermont Pub. Serv. Corp.*, 84 F.E.R.C. (CCH) ¶ 61,194 (1984). *See also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988). Thus, if the NHPUC's Disallowance Order had challenged FERC's determination of the reasonableness of the RS-2 Rate Schedule between CVEC and CVPS, the NHPUC concedes that its Order would be preempted, and a conflict would exist sufficient to overcome the Johnson Act's bar against district court injunctions.

Here, as correctly held by the First Circuit, the Disallowance Order did not substitute the NHPUC's judgment for FERC's as to the reasonableness of the RS-2 Rate Schedule. *Patch V*, 167 F.3d at 35; App. 47 ("[T]he Commission did not disallow its retail rate increase on the ground that the wholesale rates charged by [CVPS] were unjust or unreasonable."); *see also*, *NOPSI IV*, 911 F.2d at 1001 (noting that the Council's order did not question the validity of FERC's power allocation). Consequently, the NHPUC's Order contained no direct facial challenge[3] to FERC's reasonableness determination sufficient to create a conflict and trigger federal preemption.

However, the Order ***did*** clearly and unequivocally challenge the ***prudence*** of CVEC's decision to continue purchasing from CVPS under the FERC-approved schedule, when CVEC could have chosen to terminate the agreement and purchase cheaper power elsewhere. *Patch V*, 167 F.3d at 35; App. 47 ("[T]he Commission found that it is imprudent for [CVEC] to continue purchasing from [CVPS] since lower

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[3] A state law creates a "facial" challenge subject to preemption when the conflict is evident "simply by looking at the federal law, the challenged state law, and the cases applying them." *See NOPSI IV*, 911 F.2d at 998.

cost sources of energy are allegedly available--even if [CVPS's] wholesale rate might be just and reasonable in the conventional (regulatory) sense that that rate merely covers [CVPS's] own acquisition costs."). The question, then, is whether this decision encroached upon FERC's jurisdiction such that it is rightfully preempted.

As many courts have held, the answer is clearly "no," as the NHPUC's decision falls squarely within one of the exceptions to the filed-rate doctrine--the *Pike County* exception.

2. The *Pike County* Exception.

The *Pike County* exception holds that while a state commission cannot review the reasonableness of a wholesale rate set by FERC, the commission may determine whether it is in the public interest, or "prudent," for a purchaser under its jurisdiction to purchase that power in light of its available alternatives. *Pike County Light and Power Co. v. Pennsylvania Public Utility Commission*, 465 A.2d 735, 738 (Pa. Commw. Ct. 1983); *Kentucky W. Va. Gas Co.*, 837 F.2d. 600 (3rd Cir. 1988); *Central Vermont Pub. Serv. Corp.*, 84 F.E.R.C. (CCH) ¶ 61,194 (1984); *Patch V*, 167 F.3d at 35, App. 47. This Court has recognized the *Pike County* exception on two previous occasions. *See, e.g., Nantahala*, 476 U.S. at 972; *Mississippi Power*, 487 U.S. at 373-74. In *Mississippi Power*, the Court suggested, without deciding, that the exception would apply in cases where the purchasing utility "***had the legal right to refuse to buy that power.***" *Mississippi Power*, 487 U.S. at 373-74 (emphasis added). FERC itself has concluded that the exception applies where a purchaser has the legal right to purchase elsewhere:

> [A] state commission is preempted by federal law from reviewing the prudence of power

> purchases if, as a result of wholesale power supply allocations directed by [FERC], the purchaser ***has no legal choice*** but to make a particular purchase and to permit such review would interfere with [FERC's] plenary authority over interstate wholesale rates. . . . However, a state commission is not precluded under the FPA from reviewing the prudence of a wholesale purchase that was made at [FERC]-approved rates ***if the purchaser had other legal choices available.***

Central Vermont Public Service Corporation, 84 F.E.R.C. ¶ 61,194 (1998)(emphasis added).

As the above case law makes clear, when a state commission is faced with a request by a utility for recovery of costs under a rate schedule filed with and approved by FERC, the commission may legitimately inquire about and act upon questions regarding the prudence of a purchase if the utility has a legal right to refuse to buy power under the schedule. In other words, provided that CVEC had the legal right to refuse to buy power from CVPS, there is no facial conflict between the NHPUC's Order and either a federal law or a FERC determination that would trigger preemption and preclude application of the Johnson Act

3. CVEC Has The Legal Right To Refuse to Buy Power From CVPS.

CVEC has the legal right to pursue alternative power supplies for at least two reasons. First, CVEC has the power to terminate further purchases from CVPS, as the RS-2 Rate Schedule includes the following provision:

> Service under this Rate Schedule may be terminated at any time if both the Company and the Customer agree to the termination. If there is no agreement, service may be terminated at the end of a service year if the party seeking termination has given written notice of termination prior to the beginning of that service year.

App. 82.

Both the First Circuit and the district court recognize CVEC's termination rights. *Patch V*, 167 F.3d at 35-36; App. 48 ("[H]ere the contract filed with FERC itself contains a provision allowing Connecticut Valley to extract itself on one year's notice."); *see also, Patch VI*, 202 F.3d at 31, App. 65; *Patch VII*, 87 F.Supp.2d at 64, App. 25-26; *Patch VIII*, 221 F.3d at 202, App. 8-9. FERC also has acknowledged that the RS-2 contract is terminable by CVEC. *Central Vermont Public Service Corporation*, 84 F.E.R.C. ¶ 61,194 (1998)(noting that in approving the RS-2 rate schedule, FERC did not make any determination as to whether "it has become imprudent for [CVEC] not to exercise its termination rights under the contract . . . ."). Indeed, CVEC's termination rights under the RS-2 Rate Schedule were recognized as early as 1985. *See, e.g., Appeal of Sinclair Machine Products, Inc.*, 126 N.H. 822, 498 A.2d 696 (1985)("The [RS-2] rate . . . provides that the parties may terminate the agreement upon one year's notice to the other party.").

Second, apart from the existence of the termination clause, there is no FERC-mandated allocation of costs affecting the wholesale rates in the RS-2 rate schedule and therefore no FERC-mandated purchase. On two separate occasions, FERC has ruled that the RS-2 Rate Schedule is not an allocation agreement. *Central Vermont Pub. Serv. Corp.*,

81 F.E.R.C. (CCH) ¶ 61,336 at 62,542-3 (1997), *rehearing denied*, 84 F.E.R.C. (CCH) ¶ 61,295 at 62,371 (1998). Specifically, FERC found:

> This case does not present the same fact situation as *Mississippi Power* or *Nantahala*. The Commission, through its approval of the wholesale rate schedule between Central Vermont and Connecticut Valley, did not dictate a specific cost or power allocation of the type at issue in *Mississippi Power* or *Nantahala*.

Central Vermont Pub. Serv. Corp., 84 F.E.R.C. (CCH) ¶ 61,194 at 61,975 (1998).[4] Thus, the existence of the termination clause and the absence of a FERC-mandated allocation of costs give CVEC the legal right to refuse to buy power from CVPS.

Consequently, because CVEC has the legal right to refuse to buy power from CVPS, under *Pike County* and other authority there is no facial conflict between the NHPUC's Order and either a federal law or a FERC determination that would trigger preemption and preclude application of the Johnson Act. The NHPUC's prudence review of CVEC's continued purchases under the RS-2 Rate Schedule was a matter properly within the NHPUC's jurisdiction.

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[4] Nor does this case involve a situation similar to *New Orleans Public Service, Inc. v. Council of New Orleans*, 911 F.2d 993 (5th Cir. 1990), *cert. granted*, 499 U.S. 974, *cert. dismissed*, 502 U.S. 954 (1991). In that case, there was an allegation that action of the Council of New Orleans affected a FERC-mandated cost allocation concerning Grand Gulf nuclear costs. Here, there is no cost allocation approved or mandated by FERC and thus there can be no affect.

B. There Is No Conflict Or Inconsistency Between the NHPUC's Disallowance Order and the RS-2 Rate Schedule Because FERC Does Not Have Jurisdiction Over the NHPUC's Imprudence Determination.

While the district court and First Circuit understood the effect of the termination clause in terms of the filed rate doctrine, they failed to grasp the ***jurisdictional*** significance of exceptions to the filed rate doctrine such as *Pike County*. Consistent with the overall regulatory scheme contemplated by the Federal Power Act ("FPA"), *Pike County* establishes that FERC has no jurisdiction over prudence inquiries when a utility has the legal right to refuse to buy power under a FERC-approved schedule. In the absence of FERC jurisdiction, state commissions have the jurisdictional authority to engage in prudence reviews.

1. FERC Does Not Have Jurisdiction Over Imprudence Reviews.

FERC does not have jurisdiction over imprudence determinations arising out of exceptions to the filed rate doctrine such as *Pike County*. *See, e.g., Mississippi Power & Light*, 487 U.S. at 385 (Brennan, J., dissenting) ("FERC does not . . . have jurisdiction to determine whether it might be imprudent, given other purchasing options, for a retailing utility to purchase power at the FERC-approved wholesale rate."). As FERC itself acknowledges, such determinations are reserved for state commissions. For example, in *Pennsylvania Power & Light*, 23 F.E.R.C. (CCH) ¶ 61,325 (1983), FERC stated:

> We do not view our responsibilities under the Federal Power Act as including a determination that the purchaser has purchased

> wisely or has made the best deal available. However, these are legitimate concerns of the State commissions and this Commission as well in determining whether purchases reflect prudently incurred expenses for purposes of determining the purchaser's rates for sales to others.

Id.; *Southern Company Services, Inc.*, 28 F.E.R.C. (CCH) ¶ 61,349 (1984)("All we have considered is whether the sale is just and reasonable. We have not determined whether it was a prudent purchase . . . . It is our function to determine whether the Southern Companies/GSU sale is just and reasonable under the Federal Power Act. It is the state commission's function to determine whether Dow's sale to GSU warrants a payment of avoided capacity costs."); *Doswell Limited Partnership*, 50 F.E.R.C. (CCH) ¶ 61,251 (1990)("The issue of whether Doswell is a reliable and least cost alternative goes to Virginia Power's prudence in making this purchase, which is an issue that need not and should not be resolved in this docket."); *Pennsylvania Power & Light*, 23 F.E.R.C. (CCH) ¶ 61,325 (1983) (stating that challenges to the merits of a purchase in light of a utility's current energy alternatives are not "matters which the Commission must consider in determining whether this contract is just and reasonable and in the public interest under the Federal Power Act."). FERC's interpretation of its jurisdictional authority is entitled to deference. *See, e.g., Mississippi Power*, 487 U.S. at 380-82 (Scalia, J., concurring) ("it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction.") (citations omitted); *Kentucky W. Va. Gas Co.*, 837 F.2d. at 609 n.6.

FERC's interpretation of its jurisdictional authority also comports with its statutory grant of power under the FPA to determine whether wholesale rates are just and reasonable.

Doswell Limited Partnership, 50 F.E.R.C. (CCH) ¶ 61,251 (1990)("[FERC] must determine that the rates are just and reasonable under section 205 of the Federal Power Act."). FERC's power in this regard does not extend to imprudence determinations, which are separate and distinct from "just and reasonable" determinations. As noted by the Third Circuit,

> FERC's interpretation of its statutory authority recognizes that wholesale rate-making does not as a general matter determine whether a purchaser has prudently chosen from among available supply options. FERC is called upon to pass upon the justness and reasonableness of wholesale rates and wholesale transactions, not whether a retailer acted prudently in making the purchase.

Kentucky W. Va. Gas Co., 837 F.2d. at 609; *compare Doswell*, 50 F.E.R.C. ¶ 61,251 ("To determine that the proposed rates are just and reasonable, the Commission must find that they fall within a 'zone of reasonableness,' where the rates are ***lower than what would be excessive to consumers*** and higher than what would be confiscatory to investors.")(emphasis added) with *Appeal of Sinclair Machine Products, Inc.*, 126 N.H. 822, 498 A.2d 696 (1985)("The wholesale rate must be justified by the utility as the product of reasonable efforts ***to secure the lowest cost*** in light of appropriate alternatives available to the company.")(emphasis added) and *Kentucky W. Va. Gas*, 837 F.2d. at 603 ("A proposed tariff will not become effective nor will it be deemed 'just and reasonable' unless the PUC determines that the utility is pursuing a '***least cost*** fuel procurement policy' . . . .") (emphasis added).

FERC's lack of jurisdiction over imprudence reviews arising out of *Pike County* and other filed rate exceptions

means that ***necessarily*** there can be no conflict or inconsistency between the RS-2 Rate Schedule and the Disallowance Order, as "prudence reviews" and "just and reasonable determinations" simply operate in different jurisdictional spheres.

2. FERC's Jurisdictional Boundaries And The Johnson Act Combine To Limit District Court Review of State Imprudence Determinations.

Once a FERC-approved rate schedule is shown to be subject to a filed-rate exception, *Pike County* or otherwise, state commissions may validly make prudence determinations without being facially preempted by an existing FERC-approved rate. When commission authority to make prudence findings is coupled with the Johnson Act's prohibition against district court injunctions, the proper contours of district court review over imprudence determinations begin to emerge.

a) District courts are prohibited from reviewing the reasonableness of imprudence determinations.

As noted above, because FERC determinations and state commission prudence reviews operate in different jurisdictional spheres, it is impossible for a conflict to exist between a FERC-approved rate schedule and a commission's finding of imprudence.

> Since the question . . . of whether the retailer acted with economic prudence in purchasing from one wholesaler rather than another is never before FERC, the PUC is not regulating the same activity. . . . Consequently we find no

> conflict between FERC's authority and that granted to the PUC. . . .

Kentucky W. Va. Gas, 837 F.2d. at 609. As the Johnson Act bars injunctions where there is no conflict between a FERC determination and a state commission order, the jurisdictional impossibility of conflict has a direct and immediate effect on the injunctive powers of district courts--district courts are, ***as a matter of law***, powerless to pass on the ***reasonableness*** of a commission's prudence determination.

b) District courts are not prohibited from reviewing whether a utility is required to purchase power at a FERC-approved rate.

While passing on the reasonableness of prudence reviews is beyond their authority, district courts retain the power to review whether a utility has the legal right to refuse to purchase power under a specific FERC-approved contract. There is no jurisdictional bar that prevents courts from determining the existence of a *Pike County* or other exception to the filed rate doctrine. *See, e.g., Kentucky W. Va. Gas,* 837 F.2d. at 610-11 (reviewing alleged failure of state commission to consider whether the agreement between the utility and its supplier created "an unavoidable FERC-approved contractual obligation."); *NOPSI IV*, 911 F.2d at 998 (reviewing exceptions to filed rate doctrine to determine whether Council Order was preempted). Thus, while district courts may review *de novo* the question of whether a state commission has the jurisdictional authority to ***engage in*** a prudence investigation, once this authority is confirmed, they may not pass on the ***results*** of the investigation.

c) Case law comports with the delineated limitations on district court powers to review rate orders.

As the above makes clear, in cases involving challenges to state commission orders, district courts must limit their review to issues related to the applicability of particular exceptions to the filed rate doctrine, *Pike County* or otherwise. The only authorized inquiry for a federal court, consistent with the Johnson Act, is whether, under the circumstances of the case, a state commission order falls within an exception to the filed rate doctrine. Here, the district court should have limited its inquiry to issues regarding the applicability of *Pike County*, such as whether CVEC had the legal right to pursue alternative power purchases.

Case law supports the approach described above. For example, in 1988, the Third Circuit had occasion to review a state commission's decision finding a utility's continued gas purchases from an affiliate at FERC-approved rates imprudent given the availability of cheaper alternatives. *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988). The Third Circuit confirmed the authority of the Pennsylvania Public Utility Commission ("PPUC") to find that the distributor acted imprudently in continuing to purchase from its affiliate despite the fact that the gas being purchased was sold at a FERC-approved price.

In reaching this result, the Third Circuit ***never examined*** the reasonableness of the PPUC's prudency ruling. However, the court did review the PPUC's finding that the utility's "minimum bill contract" did not constitute "an unavoidable FERC-approved contractual obligation." The district court had declined to address this finding, apparently

believing that to do so would require "inquiring into the correctness of the PUC's activity in this matter." *Id.* at 610. The Third Circuit, exercising their "power of plenary review," embarked on a "time-consuming analysis of the proceedings below" and eventually concluded that the PPUC had correctly decided the issue. *Id.* In sum, while the Third Circuit freely examined the ***jurisdictional basis*** of the PPUC's prudence review, it never passed on the ***results*** of the review itself.

Similarly, in *NOPSI IV*, the Fifth Circuit analyzed the applicability of several exceptions to the filed rate doctrine, including *Pike County*, to determine whether a state commission order that prevented a local utility from passing through certain FERC–approved costs was facially preempted. The court concluded that it was not preempted, thereby upholding the commission's jurisdictional authority to conduct the prudence review. In addition, although the utility also challenged the motives of the commission in issuing the order, alleging that the commission's reasoning was simply a pretext for an end-run around the FERC-approved costs, the court refused to review the commission's determination. *NOPSI IV*, 911 F.2d at 998-1004.

Finally, in both *Patch V & Patch VI*, the First Circuit properly reviewed the question of whether a FERC-mandated obligation existed and whether *Pike County* applied. *See, e.g., Patch V*, 167 F.3d at 35-36; App. 48 ("It is arguable that the Commission could not disregard a long-term commitment by Connecticut Valley if FERC had blessed a contract that contained such a commitment . . . but here the contract filed with FERC itself contains a provision allowing Connecticut Valley to extract itself on one year's notice."). Moreover, the court never ruled on the reasonableness of the Disallowance Order, even though in *Patch VI*, the court actually expressed doubt about its prudence:

> This is not because the Commission's disallowance order is sound. At best, the state agency may be exploiting a possible drafting mistake--the short-notice termination clause in the original contract between the two utilities--to shift to Central Vermont (or to Vermont ratepayers) what may well have been Connecticut Valley's prudently incurred costs of achieving long-term rate protection for its New Hampshire customers.

Patch VI, 202 F.3d at 34; App. 65. Even harboring doubts, the court still managed to respect the appropriate jurisdictional boundaries:

> [I]f Central Vermont prevails at the Federal Energy Regulatory Commission ("FERC") and is allowed to impose a termination charge on Connecticut Valley, ***the Commission may be forced to retreat*** from its effort to compel the contract termination, thereby undermining its rationale for its disallowance order.

Id. (emphasis added).

Importantly, in both cases the court reached similar conclusions—in *Patch V*, that CVEC had not "shown likelihood of success on the merits, or even of fair ground for further litigation," *Patch V*, 167 F.3d at 36; App. 49, and in *Patch VI*, that CVEC had yet "to explain plausibly, at least to us, how the disallowance order conflicts with a federal statute or FERC order," *Patch VI*, 202 F.3d at 34; App. 65-66. The First Circuit's approach in *Patch V & VI*, as well as its results, comport with the role of federal courts delineated above. While the court did not pass on the merits of the NHPUC's imprudence review, it investigated the question of

whether the NHPUC had the authority to conduct such a review.

d) *Patch VIII*—The First Circuit inexplicably changes course.

In *Patch VIII*, the First Circuit, without explanation, simply abandoned the limitations it had seemingly embraced in *Patch V & VI*. Following the lead of the district court, *see Patch VII*, 87 F.Supp.2d at 64; App. 27 ("defendant . . . cannot sincerely claim that the Disallowance Order is based on an imprudence determination"), the First Circuit simply stepped into the NHPUC's shoes and passed judgment on the efficacy of the Disallowance Order:

> [T]ermination now apparently would be self-defeating because it would give rise to the prospect of a potentially heavy financial penalty that the state commission does not want. . . .[n3]

> [n3]Seemingly, a large exit fee would negate the savings realized from having Connecticut Valley purchase cheaper power in the short term from wholesalers other than Central Vermont; and, of course, Connecticut Valley would also lose the long-term rate protection afforded Connecticut Valley's customers by the long-term contract between Central Vermont and Hydro Quebec.

Patch VIII, 221 F.3d at 202-203; App. 9.

The First Circuit's ruling appears to hinge on the fact that CVPS filed a tariff amendment at FERC that, if

approved, would impose a termination charge on CVEC if it cancels its contract with CVPS. This unilateral act by CVPS does not, however, in and of itself invalidate the NHPUC's imprudence determination or create a conflict with federal law or any FERC determination. There is no final FERC order on the exit fee application and no NHPUC order that interferes with the exit fee. The First Circuit apparently concluded that the mere application for an exit fee by CVPS has caused the NHPUC's prior prudence justification to "evaporate." *Patch VIII*, 221 F.3d at 202; App. 9. Thus, although no conflict with federal law or any agency determination exists, the First Circuit has substituted its own analysis for that of the NHPUC and determined that the NHPUC's reasoning is unsound.[5]

This is where the First Circuit erred. It should have recognized the Johnson Act violation in the district court's decision—the failure to limit its review to the factual issues surrounding CVEC's legal ability to terminate the RS-2 schedule--rather than passing on the merits of the NHPUC's imprudence determination.[6] In ruling on ***prudence per se***,

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[5] Where the utility has the legal right to refuse to purchase under the FERC-approved rate schedule and an application is pending before FERC for an exit fee, the state commission is acting well within its jurisdictional bounds if it determines, under such circumstances, that it would be imprudent for the utility to continue its purchases. This is because the state commission may conclude that the power supply alternatives available to the utility are such that even with the possibility of an exit fee, cancellation of the contract remains the prudent choice. The reasonableness of this conclusion, however, is beyond the reach of the federal courts under the Johnson Act, as long as the state commission does not interfere with the FERC exit fee determination. As noted above, the First Circuit has consistently held that nothing in the NHPUC disallowance order precludes FERC from imposing an exit fee. *Patch V*, at 36.

[6] CVEC has never even raised the issue of the merits of the Disallowance Order, either before the NHPUC or the courts below. CVEC's challenge

rather than on the NHPUC's jurisdictional authority to conduct a prudence review under these circumstances, the district court and First Circuit crossed clear boundaries imposed by the Johnson Act. In doing so, the First Circuit gutted the jurisdictional authority of state commissions previously recognized by it in *Patch* V and VII, by the Third Circuit in *Kentucky West Va. Gas*, by the Fifth Circuit in *NOPSI IV*, and by this Court in *Nantahala* and *Mississippi Power*.

CONCLUSION

For the foregoing reasons, the petitioners ask the Court to issue a writ of *certiorari* to review and reverse the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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to the NHPUC's imprudence decision has always been that the NHPUC is preempted from making the decision, not that the decision was not rationally supported.

United States Court of Appeals
For the First Circuit

No. 00-1460

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, ET AL.,
Plaintiffs,

and

CONNECTICUT VALLEY ELECTRIC COMPANY and
CENTRAL VERMONT PUBLIC SERVICE
CORPORATION,
Plaintiffs, Appellees,

v.

DOUGLAS L. PATCH, CHAIRMAN OF THE
STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL.,
Defendants, Appellants.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Ronald R. Lagueux,* *U.S. District Judge*]

Before
Selya, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Boudin, *Circuit Judge*.

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*Of the District of Rhode Island, sitting by designation.

Gary Epler, General Counsel, New Hampshire Public Utilities Commission, with whom *Michael E. Tucci*, *Steven K. White* and *Morrison & Hecker L.L.P.* were on brief for defendants Douglas L. Patch, Susan S. Geiger and Nancy Brockway, Chairman and Commissioners of the State of New Hampshire Public Utilities Commission.

Philip T. McLaughlin, Attorney General, *Stephen J. Judge*, Associate Attorney General, Civil Bureau, *James K. Brown*, *Kathleen O. Dias* and *Foley, Hoag & Eliot LLP* on brief for Jeanne Shaheen, Governor of New Hampshire, Amicus Curiae.

Sarah B. Knowlton, *Steven V. Camerino* and *McLane, Graf, Raulerson & Middleton, P.A.* on joinder brief for City of Claremont, New Hampshire, Amicus Curiae.

Lee A. Freeman, Jr. with whom *John F. Kinney*, *James T. Malysiak*, *Glynna W. Freeman*, *Freeman, Freeman & Salzman, P.C.*, *Joseph M. Kraus*, Senior Vice President and General Counsel, Central Vermont Public Service Corporation, *Dom S. D'Ambruoso*, *John T. Alexander* and *Ransmeier & Spellman* were on corrected brief for plaintiffs Central Vermont Public Service Corporation and Connecticut Valley Electric Company.

July 25, 2000

BOUDIN, *Circuit Judge*. This appeal is the latest installment in a series growing out of New Hampshire's efforts to deregulate the electric utility industry and trim rates

for customers.[1] Familiarity with our prior decisions is assumed. We repeat here only those facts pertinent to the present issue.

Connecticut Valley Electric Company ("Connecticut Valley"), a small New Hampshire utility, provides retail electric service to about 10,000 customers in New Hampshire. Connecticut Valley purchases about 76 percent of its power from its parent company, Central Vermont Public Service Corporation ("Central Vermont"), a Vermont utility, under a wholesale requirements contract ("the RS-2 contract") that incorporates cost-of-service rates ("the RS-2 rate schedule") filed with and regulated by the Federal Energy Regulatory Commission ("FERC"). Connecticut Valley and Central Vermont have had a requirements contract incorporating some form of the RS-2 rate schedule since 1982.

The RS-2 contract has a termination clause that, read literally, permits either party to terminate the contract at the end of a service year by giving written notice of termination before the beginning of that service year. *See Patch* V, 167 F.3d at 32. Connecticut Valley and Central Vermont contend that the termination clause was not intended to give either of them the ability to terminate unilaterally on such short notice, but the district court found it unnecessary to decide whether the one-year termination clause allows Connecticut Valley to terminate on the specified notice if and when its own interests so dictate.

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[1] *Public Serv. Co. v. Patch*, 962 F. Supp. 222 (D.N.H. 1997) (*Patch I*); *Public Serv. Co. v. Patch*, 173 F.R.D. 17 (D.N.H. 1997) (*Patch II*); *Public Serv. Co. v. Patch*, 136 F.3d 197 (1st Cir. 1998) (*Patch III*); *Public Serv. Co. v. Patch*, 167 F.3d 15 (1st Cir. 1998) (*Patch IV*); *Public Serv. Co. v. Patch*, 167 F.3d 29 (1st Cir. 1998) (*Patch V*), *cert. denied*, 526 U.S. 1066 (1999); *Public Serv. Co. v. Patch*, 202 F.3d 29 (1st Cir. 2000) (*Patch VI*); *Public Serv. Co. v. Patch*, 87 F. Supp. 2d 57 (D.N.H. 2000) (*Patch VII*).

Central Vermont's rates under the RS-2 contract with Connecticut Valley are higher than the current rates for wholesale electricity available elsewhere in New Hampshire, due in part to an expensive long-term contract by which Central Vermont purchases from Hydro Quebec. In February 1997, as part of its restructuring of electricity regulation in New Hampshire, the New Hampshire Public Utilities Commission ("the Commission") found that Connecticut Valley should have given notice of termination of its RS-2 contract on or before December 31, 1996. This finding was made in computing the so-called "stranded cost recovery charge" that Connecticut Valley would otherwise be allowed to recover from customers as part of the deregulation process. *Re Connecticut Valley Elec. Co.*, Order No. 22,509 (Feb. 28, 1997) (the "Stranded Cost Recovery Order").[2]

Concerned that Connecticut Valley would terminate the RS-2 contract and thereby leave Central Vermont alone with a long-term obligation to buy expensive power from Hydro Quebec, Central Vermont in June 1997 filed with FERC its own proposal to terminate the RS-2 contract. However, it made termination contingent on FERC allowing Central Vermont to add a "stranded cost surcharge" on power delivered over its transmission lines to customers in Connecticut Valley's service area. FERC rejected that proposal as inconsistent with earlier FERC orders and regulations, but decided to allow Central Vermont to file a different plan that would impose an exit fee on Connecticut Valley at the contract's termination, and thus ensure that Connecticut Valley shared in the loss to Central Vermont that would result from termination of the contract. *See Central*

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[2]"Stranded costs" is a loose concept referring, in the present context, primarily to investments that a utility made during the period of monopoly service which are jeopardized by deregulation--for example, by new obligations to allow the utility's lines to be used by other suppliers. The restructuring and deregulation process in New Hampshire, including the statute and the Commission's evolving plan to implement it, are described in detail in *Patch IV*, 167 F.3d at 18-22.

Vt. Pub. Serv. Corp., 81 F.E.R.C. ¶ 61,336, at 62,543 (1997), *aff'd*, --F.3d--, No. 98-1532, 2000 WL 762766 (D.C. Cir. June 30, 2000).

In December 1997, Central Vermont notified FERC that it would seek a tariff amendment to establish an exit fee (to recover its own stranded costs). The recovery of stranded costs at the wholesale level is the subject of extensive FERC regulation, recently sustained in almost all respects by the D.C. Circuit in *Transmission Access Policy Study Group v. FERC*, --F.3d--, Nos. 97-1715 et al., 2000 WL 762706, at *24 (D.C. Cir. June 30, 2000). FERC accepted the proposed exit fee provision for filing in March 1998. *See Central Vt. Pub. Serv. Corp.*, 82 F.E.R.C. ¶ 61,237, at 61,908 (1998). A hearing has now been held before an administrative law judge at FERC, but no decision on either the propriety or the amount of the fee has yet been issued.

In late December 1997, as the state's restructuring proceedings continued, Connecticut Valley applied for a routine increase in its 1998 retail rates to incorporate increases in Central Vermont's RS-2 rate schedule. Such adjustments to the RS-2 schedule are made periodically by Central Vermont to reflect changes in its cost of acquiring power, and, in the past, the Commission has allowed them to be passed through by Connecticut Valley to its own customers. FERC accepted Central Vermont's increased RS-2 rates for filing on January 13, 1998. This time, instead of approving the requested increase, the state commission found Connecticut Valley imprudent for not terminating the RS-2 contract sooner because power was available for less money on the open market, and it disallowed the requested increase. *Connecticut Valley Elec. Co.*, Order No. 22,815 (Dec. 31, 1997) ("the Disallowance Order"). This finding paralleled the reasoning behind its Stranded Cost Recovery Order.

In the same period, litigation concerning New Hampshire's plan for restructuring the electric utility industry was proceeding in this court and the district court. In December 1998, we upheld a preliminary injunction in which the district court prohibited the Commission from implementing its broad deregulation plan. *Patch IV*, 167 F.3d at 28-29. However, in a companion decision, *Patch V*, we vacated the injunction to the extent it required the Commission to allow Connecticut Valley to recover through its retail rates the full cost of wholesale power purchased under the RS-2 contract. 167 F.3d at 36. We found that Connecticut Valley had not shown a likelihood that the Disallowance Order was enjoinable by a federal court under the restrictive terms of the Johnson Act, 28 U.S.C. § 1342 (1994).

Our decision in *Patch V* permitted the Commission to roll back Connecticut Valley's retail rates to the 1997 level. However, after that decision, the Commission ordered Connecticut Valley to reduce its rates temporarily below the 1997 level in order to refund to customers the higher rates they had paid while the district court's preliminary injunction was in effect. *Connecticut Valley Elec. Co.*, Order No. 23,168 (Mar. 22, 1999) ("the Refund Order"). Connecticut Valley and Central Vermont objected to the district court regarding this further reduction; the district court agreed; and on April 7, 1999, it enjoined the Commission from ordering the refund. The Commission again appealed to this court.

In *Patch VI*, decided on January 24, 2000, we found that the injunction against the Refund Order could not be sustained on the basis thus far supplied, but allowed the district court 90 days to provide a sufficient basis for such an injunction. 202 F.3d at 34-35. The district court then sought to supply that explanation and, at the same time, to dispose of the parties' cross-motions for summary judgment as to the underlying dispute. On March 6, 2000, the district court

concluded that Connecticut Valley and Central Vermont are entitled to a permanent injunction allowing Connecticut Valley to pass through to its retail customers the cost of wholesale power it purchases from Central Vermont under the RS-2 contract. *Patch VII*, 87 F. Supp. 2d at 65. The Commission now appeals.

The district court's summary judgment decision, which we review *de novo*, *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996), rested in major part on an order of the Commission issued on July 22, 1998, in which the Commission vacated a directive in its February 1997 Stranded Cost Recovery Order, *Re Statewide Elec. Util. Restructuring Plan*, Order No. 22,986 (July 22, 1998) ("the Vacation Order"). In particular, the Vacation Order canceled the Commission's prior directive instructing Connecticut Valley to terminate the RS-2 contract. Because the Commission no longer demanded that Connecticut Valley terminate its RS-2 Contract on the basis of its "imprudence," the district court ruled that federal law required the Commission to allow recovery of the federal tariff rate for purchases under that contract. *Patch VII*, 87 F. Supp. 2d at 64-65.

We begin our review with the main legal constraint that governs federal injunctions against state utility rates. Where such relief is sought, it is not enough for the utility to establish federal jurisdiction and a claim for relief on the merits; it must also show that the injunction comports with the Johnson Act, which allows such injunctions only under very limited conditions. One such condition is where the state rate order conflicts with a federal statute or a federal agency action. *See Patch V*, 167 F.3d at 33 (citing case law). The showing of such a conflict would normally satisfy the Johnson Act *and* make out a federal claim for relief. *See, e.g., Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 377 (1988).

The issue in this case is not about these principles, which are well-settled, but about whether on the facts before us the challenged orders of the state commission are inconsistent with a federal regulatory scheme. Patently, the state commission is refusing to allow Connecticut Valley to collect revenues to pay the full federal tariff rate for the power it is buying from Central Vermont under the RS-2 tariff; indeed, the refund ordered by the Commission is designed to make Connecticut Valley give back to customers some of the revenue it collected for that purpose.

Of course, FERC has not ordered the state commission to do anything; it has merely allowed Central Vermont to file a federal tariff (the RS-2 tariff) setting a rate for wholesale power sales to Connecticut Valley. But if the purchase is not improper, then the refusal of the state commission to allow the purchasing utility to pay the federal tariff rate, and include that cost in its own rates, is inconsistent with the federal scheme. The reason is that the rates set by the FERC tariff are binding unless and until altered by FERC. See *Mississippi Power & Light Co.*, 487 U.S. at 371-74; *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986).

Nevertheless, while the Supreme Court left the issue open, we held in *Patch V* that a state commission could disallow costs, even where they reflected payments required under a federal tariff, where the state agency had a colorable independent state ground for finding that the purchaser should not have made the purchase. 167 F.3d at 35; *see also Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 608-09 (3d Cir.), *cert. denied*, 488 U.S. 941 (1988). And, initially, the Commission did make a colorable ruling in its Disallowance Order that Connecticut Valley's continued purchasing from Central Vermont was imprudent, given Connecticut Valley's apparent opportunity to terminate its contract on one year's notice and switch to

cheaper--albeit possibly short-term--power from other suppliers.

But faced with the threat of termination, Central Vermont then filed a tariff amendment that now threatens to impose a heavy termination charge on Connecticut Valley if it does cancel its contract. FERC (which more or less invited the amendment) has allowed the amendment to go into effect provisionally and, while FERC may in due course disallow the charge or reduce its amount, the amendment is in force for the time being. *See* 82 F.E.R.C. ¶ 61,237, at 61,909 (1998) ("Central Vermont's proposed exit fee is hereby accepted for filing and suspended for a nominal period, to become effective on March 14, 1998, subject to refund...."). Further, the state commission has now, in its Vacation Order, explicitly withdrawn the prior ruling that Connecticut Valley should terminate its requirements contract. In sum, the Commission's prior justification for disallowing the pass-through has evaporated.

The Commission says on appeal that its Vacation Order only nullified its prior order requiring Connecticut Valley to terminate the contract and did not affirmatively order the utility to continue buying under the contract. The lack of an affirmative order is irrelevant: the RS-2 contract requiring purchases is binding on Connecticut Valley unless terminated; termination now apparently would be self-defeating because it would give rise to the prospect of a potentially heavy financial penalty that the state commission does not want;[3] and so long as purchases from Central Vermont continue to be legitimately made under the contract,

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[3]Seemingly, a large exit fee would negate the savings realized from having Connecticut Valley purchase cheaper power in the short term from wholesalers other than Central Vermont; and, of course, Connecticut Valley would also lose the long-term rate protection afforded Connecticut Valley's customers by the long-term contract between Central Vermont and Hydro Quebec.

Connecticut Valley must pay the FERC tariff rate, and the state commission must allow it to reflect that rate in its own charges.

Alternatively, the Commission says that even if current conditions make it prudent to continue the purchases, the contract could and should have been terminated before Central Vermont filed the termination charge. However, read literally, FERC regulations say that Central Vermont could have imposed the termination charge, assuming it were otherwise justified, whenever Connecticut Valley sought to terminate its contract--so long as the contract was still in force when the charge was filed. 18 C.F.R. § 35.26(c)(1)(v) (1999). The RS-2 contract required at least one-year's notice before termination became effective.

The Commission points to language in the original FERC order adopting such regulations, arguably contrary to the present regulation itself, saying that a selling utility could not add an exit fee after a purchasing utility "gives notice" of termination. Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,642 n.679 (1996). However this arguable tension between the regulation and order may be resolved, it is hard to see how Connecticut Valley--a wholly-owned subsidiary--could have effected a surprise termination.[4] Also, the FERC order says that even where notice is given, the seller could still recover its stranded costs through transmission charges to the canceling utility. *Id.*

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[4]Even if we put aside the fact that Connecticut Valley is a wholly-owned subsidiary of Central Vermont, it would have been easy enough for Central Vermont, at the first sign of an intent to terminate or at any sign of pressure from the Commission on Connecticut Valley to terminate, to file its termination charge with FERC. Indeed, this is more or less what happened.

Finally, the Commission, joined in a separate amica curiae brief by the Governor of New Hampshire, claims that whether the continued purchases are imprudent under state law is a matter for the Commission and the state courts, and that the district court's injunction is inconsistent with the so-called *Burford* doctrine. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 332-34 (1943). *Burford*, discussed at some length in *Patch IV*, 167 F.3d at 24, aims to prevent federal courts from "bypassing a state administrative scheme and resolving issues of state law and policy that are committed in the first instance to expert administrative resolution." *Id.*

However, we are not concerned here with whether the imprudence finding is proper under state law but rather with whether, given its substance and context, it furnishes a basis for the state commission to ignore an otherwise controlling FERC tariff. In such cases, the "adequacy" of an asserted "independent state ground" is--indeed, under the Supremacy Clause must be--an issue of federal law.[5] *Burford* does not license a state to ignore FERC tariffs merely by saying, without any present rational basis, that the purchase is "imprudent." This is so even if the Commission's "imprudence" finding has not been withdrawn and is still tolerated under state law.

Nor is it of any moment whether the Commission has, or has not, acted in good faith in refusing to allow Connecticut Valley to collect the FERC tariff charges. Indeed, we assume throughout that the Commission is motivated simply by a desire to secure lower rates for New Hampshire consumers. But absent a colorable objective

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[5] *See Howlett v. Rose*, 496 U.S. 356, 366 (1990) ("The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review de novo."); *see also Wolfe v. North Carolina*, 364 U.S. 177, 185-86 (1960); *Staub* v. *City of Baxley*, 355 U.S. 313, 318-19 (1958); *Ward v. Board of County Comm'rs*, 253 U.S. 17, 22-23 (1920).

justification, the state agency may not disallow, in state rate-making proceedings, costs that were incurred under a federal tariff for a permissible purchase of wholesale power.

Affirmed.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.,	)	
Plaintiffs	)	
AND	)	N.H. C.A. No. 97-97-JD
	)	R.I. C.A. No. 97-121-L
CONNECTICUT VALLEY ELECTRIC COMPANY AND CENTRAL VERMONT PUBLIC SERVICE CORPORATION, ET AL.,	)	
Plaintiffs/ Interveners,	)	
V.	)	
DOUGLAS L. PATCH, BRUCE ELLSWORTH AND SUSAN S. GEIGER,	)	
Defendants	)	

DECISION AND ORDER

Ronald R. Lagueux, District Judge*

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* Of the District of Rhode Island, sitting by designation.

This matter is the latest installment in the extensive litigation resulting from New Hampshire's attempt to deregulate its electric utility industry.[1] However, for the reasons set forth below, the particular issue decided today is distinct from the many issues surrounding the implementation of that deregulation effort. Specifically, the question before the Court at present is whether Connecticut Valley Electric Company ("plaintiff") is entitled to a permanent injunction mandating the New Hampshire Public Utility Commission ("defendant") to pass through in plaintiff's retail rates the wholesale energy price paid by plaintiff to Central Vermont Public Service Corporation ("Central Vermont") while plaintiff is purchasing power from Central Vermont pursuant to a federally-approved contract and tariff. This Court concludes that plaintiff is entitled to such relief and a permanent injunction shall issue.

I. Background

Plaintiff, a New Hampshire corporation, distributes and sells electric service to approximately 10,000 customers in western New Hampshire. Plaintiff purchases seventy-six percent (76%) of its power from its parent Central Vermont, a Vermont corporation, pursuant to an interstate cost-of-service-based wholesale requirements rate schedule ("RS-2 Rate Schedule") approved by the Federal Energy Regulatory Commission ("FERC"). This purchasing arrangement has been in place since 1950 and some form of the RS-2 Rate

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[1] *See Public Serv. Co. of N.H. v. Patch*, 952 F. Supp. 222, (D.N.H. 1997) ("Patch I"); *Public Serv. Co. of N.H. v. Patch*, 173 F.R.D. 17 (D.N.H. 1997) ("Patch II"); *Public Serv. Co. of N.H. v. Patch*, 136 F.3d 197 (1st Cir. 1998) ("Patch III"); *Public Serv. Co. of N.H. v. Patch*, 167 F.3d 15 (1st Cir. 1998) ("Patch IV"); *Public Serv. Co. of N.H. v. Patch*, 167 F.3d 29 (1st Cir. 1998) ("Patch V"), *cert. denied*, -U.S.-, (1999); *Public Serv. Co. of N.H. v. Patch*, -F.3d-, 20000 WL 39123 (1st Cir. 2000) ("Patch VI").

Schedule has been in existence since 1982. The RS-2 Rate Schedule contains the following clause ("Section E"):

> E. Termination. Service under this rate schedule may be terminated at any time if both [Central Vermont] and [plaintiff] agree to the termination. If there is no agreement, service may be terminated at the end of a service year if the party seeking termination has given written notice of termination prior to the beginning of that service year.

As discussed below, the parties vigorously dispute the ramifications of this clause.

Plaintiff purchases the remainder of its power from other sources not relevant to the case at bar. Plaintiff's retail rates are set forth in a retail tariff which is subject to approval by defendant.

Approximately ninety percent (90%) of the power Central Vermont supplies to plaintiff is purchased from other sources, pursuant to several long-term contracts. One of those contracts is with Hydro Quebec. That arrangement was made on a long-term basis in 1990 so that Central Vermont and plaintiff would have a firm and reliable source of power to service their customers. That arrangement and the rates to be paid were approved by FERC, the Vermont Public Service Board and defendant as it was then constituted.

At all times relevant to this matter (because of the passage of time and change of power supply circumstances) these long-term contract prices have exceeded wholesale electricity prices in New England. Because Central Vermont essentially passes these Prices through to plaintiff under the

RS-2 Rate Schedule, plaintiff has been buying power from Central Vermont at higher-than-market wholesale rates.[2]

In 1996, with the purpose of reducing the state's retail electric rates, the New Hampshire legislature adopted the Electric Utility Restructuring Act, N.H.Rev.Stat.Ann. §§ 374-F:1 et seq. (1999) ("the Act"), providing for the introduction of competition into the New Hampshire electric utility industry. Pursuant to the power vested in it by this statute, defendant issued a restructuring plan (the "Final Plan") and implementing orders on February 28, 1997. *See* Order No. 22,514; Orders No. 22,509-22,513 (specific utilities' interim stranded cost rulings). Familiarity with the Final Plan's details is assumed as it is described at length in Patch I and Patch IV. *See Patch*, 962 F.Supp. at 226-228; *Patch*, 167 F.3d at 18-19. Of importance here is defendant's February 28, 1997 order which denies plaintiff a stranded cost recovery charge for power purchased from Central Vermont to the extent that the cost of that power exceeds wholesale prices generally available in the New Hampshire market. *See* Order No. 22,509 ("Stranded Cost Recovery Order"). Defendant's rationale for this determination was that plaintiff should, pursuant to Section E, terminate the RS-2 Rate Schedule and avail itself of current market prices, thus avoiding any stranded costs upon the implementation of restructuring. *See id.*

On March 3, 1997, Public Service Company of New Hampshire ("PSCNH"), the largest electric utility in New

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[2] It is to be noted that any New England electric utility that purchases power because of the lack of generation facilities of its own needs a firm and reliable source to meet its peak demands in December when all the Christmas lights are on and in July when all the air conditioners are running. It must pay a premium to have that committed reliability. Therefore it is somewhat misleading to compare those rates with wholesale rates for power available in the New England power pool during off-peak periods.

Hampshire, brought suit in this court, seeking to enjoin implementation of the Final Plan on a number of federal constitutional grounds. This Court granted a temporary restraining order ("TRO") against implementation of the Final Plan on March 10, 1997. On March 21, 1997, after an evidentiary hearing, this Court renewed the TRO and requested briefing on the issues of ripeness and abstention. In Patch I, issued April 28, 1997, this Court rejected those grounds for dismissal of this case, rejected defendant's claim that the Court lacked jurisdiction under the Johnson Act, 28 U.S.C. § 1342, and concluded that the TRO should remain in place until further order of the Court. *See Patch*, 962 F.Supp, at 244.

In Patch II, issued June 12, 1997, this Court allowed several other New Hampshire electric utilities to intervene in the litigation as of right. *See Patch*, 173 F.R.D. at 28. Shortly thereafter, on June 18, 1997, plaintiff and Central Vermont were permitted to intervene.

Fearful of the consequences if defendant ultimately prevailed in the litigation and forced plaintiff to terminate the RS-2 Rate Schedule, Central Vermont initiated a proceeding before FERC on June 25, 1997 to terminate the contract. Central Vermont proposed that, as a condition of termination, it be allowed to amend its open access transmission tariff to add a stranded cost surcharge to its transmission rates when transmission was for ultimate delivery of power to plaintiff's service area. This surcharge would enable Central Vermont, upon termination of the RS-2 Rate Schedule, to recover the difference between the long-term contract rates and the lesser market rate at which it could then sell power. FERC rejected this proposal, but deferred notice of cancellation and invited Central Vermont to request an alternative loss-shifting method, namely, an amendment to the RS-2 Rate Schedule imposing an exit fee on plaintiff in the event of termination. *See Central Vermont Pub. Serv. Corp.*, 81 F.E.R.C. ¶ 61,336,

62,543 (1997), *available in* 1997 WL 779009. On December 27, 1997, Central Vermont made the suggested request and, on March 11, 1998, FERC accepted it for filing, suspended the fee provision and ordered a hearing, which has not yet occurred. *See Central Vermont Pub. Serv. Corp.*, 82 F.E.R.C. ¶61,237, 61,908 (1998), *available in* 1998 WL 111732. FERC also rejected Central Vermont's notice of contract cancellation, thus, the RS-2 Rate Schedule remains in effect to this day.

During this period, regulation of the electric utility industry continued as usual in New Hampshire. Consequently, in the fall of 1997, plaintiff submitted tariff changes to defendant to secure an increase in plaintiff's retail rates which would pass through to customers an increase in Central Vermont's wholesale rates under the RS-2 Rate Schedule. FERC approved the changes to the RS-2 Rate Schedule on January 13, 1998. Under such circumstances, defendant had previously approved retail rate increases. However, on December 31, 1997, defendant issued an order disallowing the increase, essentially freezing plaintiff's retail rates at the 1997 level. *See* Order No. 22,815 ("Disallowance Order"). Defendant's rationale for this action was that plaintiff had acted imprudently by not terminating the RS-2 Rate Schedule one year earlier under Section E and thus was not entitled to pass through the elevated costs to consumers. *See id.*

On January 19, 1998, plaintiff and Central Vermont filed a motion in the pending litigation of which they were now a part, seeking a temporary restraining order and then a preliminary injunction to require defendant to allow the pass-throughs. The utilities put forth two alternative arguments: 1) that the Disallowance Order effectively violated the existing TRO against implementation of the Final Plan and 2) that the Disallowance Order was preempted by FERC's exclusive jurisdiction over the RS-2 Rate Schedule. On April 3, 1998,

after a hearing, this Court issued a decision from the bench granting plaintiff's request for a preliminary injunction. The Court stated on the record that the March 21, 1997 TRO secured by PSCNH, prohibiting implementation of the Final Plan, applied to all New Hampshire utilities, including plaintiff, and that defendant's action was an "end run" around that injunction. The Court then opined that defendant's action was also vulnerable on both preemption and takings grounds. On April 9, 1998, this Court entered a formal preliminary injunction mandating defendant to allow the retail rate increase.

In the meantime, two further developments occurred in the case. The first was an appeal to the First Circuit by interested parties, other than New Hampshire electric utilities, whose intervention was denied in Patch II. *See Patch*, 173 F.R.D. at 29. In Patch III, issued February 3, 1998, the First Circuit affirmed the denial of those parties' motion to intervene. *See Patch*, 136 F.3d at 210. The second was defendant's receipt of petitions for reconsideration of the Final Plan. On March 20, 1998 defendant entered a new order, Order No. 22,875, modifying the Final Plan in various respects not relevant to the issue at hand. The modified Final Plan did not alter or displace the disallowance contained in the Stranded Cost Recovery Order. Subsequently, PSCNH, along with the interveners, filed a further amended complaint in this Court alleging many of the original claims.

On June 5, 1998, this Court held a hearing to consider the effect of the March 20, 1998 order modifying the Final Plan. On June 12, 1998, this Court issued an order prohibiting defendant from requiring PSCNH, or any other intervener, to comply with the modified Final Plan.

Defendant appealed the issuance of both the April 9 and June 12 orders. In Patch IV, issued December 3, 1998, the First Circuit upheld the issuance of the order enjoining

defendant from implementing the modified Final Plan as to any New Hampshire electric utility. *See Patch*, 167 F.3d at 28-29.

However, in Patch V, a companion opinion issued the same day as Patch IV, the First Circuit vacated the preliminary injunction requiring defendant to allow the pass-throughs. *See Patch*, 167 F.3d at 36. The Court first concluded that, because the Disallowance Order was "an exercise of conventional cost-based rate regulation" not purporting to rest on the Final Plan, the April 9 injunction could not be defended as an enforcement of the injunction against the Final Plan's implementation. *Id.* at 35. The Court next considered whether an independent justification for the preliminary injunction existed; namely, whether plaintiff could prove a likelihood of success on the merits of its preemption claim. *See id.* For reasons discussed in more detail below, the First Circuit concluded that plaintiff could not, and thus vacated the April 9, 1998 preliminary injunction, leaving defendant free to roll back plaintiff's retail rates to 1997 levels. *See id.* at 35-36.

On January 19, 1999, plaintiff and Central Vermont filed the motion for summary judgment now before the Court. Plaintiff seeks a permanent injunction requiring defendant to allow a retail rate increase to pass through plaintiff's wholesale purchase costs, arguing again that the Disallowance Order is preempted by federal law. In addition, despite the clear demarcation of the issues by the First Circuit in Patch V, plaintiff and Central Vermont also seek a permanent injunction prohibiting implementation of the Final Plan. The utilities argue that the Final Plan, including the Stranded Cost Recovery Order, violates the federal constitution on a variety of grounds, many similar to those raised in the original complaint by PSCNH. Defendant opposed the motion and filed a summary judgment motion of its own, seeking judgment against both parties on all grounds.

On October 20, 1999, this Court heard oral arguments on these cross-motions for summary judgment.

In the meantime, however, another dispute between the parties arose. Upon dissolution of the April 9, 1998 preliminary injunction, defendant not only rolled back plaintiff's retail rates to the 1997 levels, but also ordered further temporary reductions to essentially refund to customers the higher amounts collected during the period that the preliminary injunction had been in effect. Plaintiff responded by asking this Court to enjoin defendant from ordering such further reductions until plaintiff's request for permanent relief was decided on the merits.

On May 11, 1999, after an April 7, 1999 hearing, this Court issued an order prohibiting defendant from further reducing plaintiff's retail rates below the 1997 level. Defendant appealed. In Patch VI, issued January 24, 2000, the First Circuit specified that defendant's "refund" order, like its Disallowance Order, was not an implementation of the Final Plan and thus not a violation of the June 12, 1998 preliminary injunction. *See Patch*, 2000 WL 39123 at *4. The Court then stated that agencies like defendant "often require refunds of rates 'wrongly' collected. Unless the original...order disallowing [plaintiff's] increase is vulnerable to injunction by a federal court, it is hard to see what authority a federal court has to defer the [defendant]-ordered refund. And, as we explained in Patch V...[plaintiff] has not yet made such a showing of likely vulnerability as to the disallowance order." *Id.* at *5 (citation omitted). However, the Court concluded that "the district court may be on the verge of supplying the missing explanation in deciding the merits of the now-submitted cross-motions for summary judgment." *Id.* Consequently, the First Circuit remanded the matter to this Court, with instructions that this Court could defer vacation of the May 11, 1999 preliminary injunction for up to 90 days while the Court considered the merits of

permanent relief.[3] *See id.* at *6. It will be unnecessary to issue that 90-day deferment order in view of the decision rendered today.

As the First Circuit predicted, the disallowance issue is now in order for decision. This Court will now supply the "missing explanation" for the grant of a permanent injunction requiring defendant to pass through plaintiff's wholesale purchase costs.

This Court will not, however, address the summary judgment arguments of plaintiff, Central Vermont and defendant as to the validity of the Final Plan as a whole or the validity of the Stranded Cost Recovery Order. The First Circuit clearly distinguished between the two issues and this Court will abide by those distinctions. Furthermore, the litigation between PSCNH and defendant has been stayed, as those parties are currently negotiating toward a settlement. The June 12, 1998 preliminary injunction maintains the status quo in the meantime. As PSCNH supplies about seventy percent (70%) of the retail electric power in New Hampshire, any settlement it reaches with defendant will likely affect the situation of plaintiff and Central Vermont and may eliminate or at least modify the claims put forth in their summary judgment motion. Thus, this Court will stay that aspect of the litigation until negotiations between PSCNH and defendant are either abandoned or result in a resolution.[4]

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[3] In Patch VI, the First Circuit also considered this Court's order denying defendant's January 18, 1999 motion to dissolve the June 12, 1998 preliminary injunction. The Court affirmed the denial of the motion. *See id.* at *3. Thus, the June 12, 1998 preliminary injunction, prohibiting implementation of the Final Plan, has been affirmed by the First Circuit on two separate occasions and remains in effect.

[4] At the October 20, 1999 hearing, this Court also heard oral arguments regarding cross-motions for summary judgment filed by plaintiff/intervener Unitil Corporation and defendant. For the reasons just

Therefore, the sole issue addressed today is whether either party is entitled to summary judgment on plaintiff's request for a permanent injunction mandating defendant to allow the pass through rates. This Court concludes with ease that plaintiff is entitled to the relief it requests.

II. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the standard for ruling on a summary judgment motion:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56 (c). Thus, summary judgment may be granted when no "reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether summary judgment is appropriate, the Court must view the facts on the record and all inferences therefrom in the light most favorable to the nonmoving party. *See Continental Cas. Co. v. Canadian Universal Ins. Co.*, 924 F.2d 370, 373 (1st Cir. 1991). When deciding cross-motions for summary judgment, the Court must consider each motion separately, drawing inferences against each movant in turn. *See Blackie v. Maine*, 75 F.3d 716, 721 (1st Cir. 1996). Summary judgment is appropriate when there is no dispute as to any material fact and only questions of law remain. *See id.*

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expressed, this Court will stay resolution of those motions while the PSCNH negotiations continue.

III. Discussion

Despite its complicated history, the "missing explanation" for this portion of the case is really rather simple. As the First Circuit explicated in Patch V, an independent justification for a federal injunction requiring defendant to allow the pass-throughs would exist only if the disallowance is preempted by federal law. *See Patch*, 167 F.3d at 35.[5]

Plaintiff argues that the Disallowance Order is in fact preempted under the "filed-rate" doctrine, which essentially prevents a state commission from taking any action that alters a wholesale rate or power allocation lawfully set by FERC. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371-372 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-966 (1986). Thus, "[s]tates may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates." *Mississippi Power*, 487 U.S. at 372. The doctrine is based on FERC's exclusive jurisdiction to determine the reasonableness of wholesale rates. *See Id.* at 371.

Defendant responds by arguing that the Disallowance Order was not based on a determination of the reasonableness of the rates, but on the imprudence of plaintiff's decision to continue to purchase power under the RS-2 Rate Schedule. Such a "prudence" determination, defendant argues, is within the jurisdiction of a state commission and not preempted under the filed-rate doctrine. *See Id.* at 373 ("[W]e may assume that a particular *quantity* of power procured by a

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[5] A finding of preemption, as opposed to a different constitutional violation, is necessary to avoid the limitations imposed by the Johnson Act, 28 U.S.C. § 1342 (1994). The Johnson Act prohibits federal injunctions against state rate orders under certain circumstances; however, it does not bar an injunction where the order is found to be inconsistent with a federal statute or agency determination. *See id. See also Patch*, 167 F.3d at 33 (citing authorities).

utility from a particular source could be deemed unreasonably excessive if lower-cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price.*") (quoting *Nantahala*, 476 U.S. at 972) (emphasis in *Nantahala*). *See also Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n.*, 837 F.2d 600, 609 (3rd Cir. 1988), *cert. denied*, 488 U.S. 941 (1988); *Palisades Generating Co.*, 48 F.E.R.C. ¶61,144, 61,574 and n.10 (1989), *available in* 1989 WL 262105.

Plaintiff responds by first arguing that there is no such imprudence exception to the filed-rate doctrine. Alternatively, plaintiff argues that the application of such an exception depends upon the utility's legal ability to purchase power from an alternative source. *See Mississippi Power*, 487 U.S. at 373-374 ("it might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power, even at FERC-approved rates, *if it had the legal right to refuse to buy that power*") (emphasis added). *See also Nantahala*, 476 U.S. at 972-973. Despite Section E, plaintiff claims that the RS-2 Rate Schedule establishes a long-term commitment that plaintiff is not legally empowered to terminate. In such a situation, plaintiff argues, the filed-rate doctrine applies to preempt any claimed "prudence" determination.

The First Circuit, upon considering these same arguments to determine the appropriateness of preliminary relief, agreed with defendant that an imprudence determination creates an "escape hatch" from the filed-rate doctrine. *See Patch*, 167 F.3d at 35. The Court then acknowledged that it was at least "arguable" that such an escape hatch was unavailable in the face of a long-term commitment blessed by FERC. *Id.* at 36. However, the Court concluded that because of the apparent one-year termination provision contained in Section E, defendant's

decision that plaintiff had acted imprudently in not exercising its termination right was likely a proper exercise of its "prudence review" power and thus likely not preempted by FERC's jurisdiction over the RS-2 Rate Schedule. *See id.*

The parties now exhaust much time and effort arguing over the ramifications of Section E and the degree of deference that should be given to the First Circuit's statements regarding plaintiff's ability to terminate the RS-2 Rate Schedule under Section E.

However, buried in the mass of paper submitted to this Court is an undisputed fact which moots these arguments and summarily blunts defendant's position as a matter of law. On July 22, 1998, defendant *rescinded* its previous directive to plaintiff, contained in the Stranded Cost Recovery Order, to terminate the RS-2 Rate Schedule. *See* Order No. 22,986. This action was obviously based on defendant's desire to avoid the potentially severe adverse consequence of the purchase contract's termination, namely, the imposition of an exit fee on plaintiff that defendant would be required to pass through to New Hampshire retail customers. *See Id.*

Without knowledge of this fact, the First Circuit in Patch VI opined as to the consequences of such a situation: "[I]f Central Vermont prevails at . . . FERC . . . and is allowed to impose a termination charge on [plaintiff], [defendant) may be forced to retreat from its effort to compel the contract termination, thereby undermining its rationale for its disallowance order." *Patch*, 2000 WL 39123 at *5. Clearly, defendant's complete turnaround of its position regarding the desirability of contract termination completely undermines its rationale for the Disallowance Order. Although the two orders were distinct, the Disallowance Order and the Stranded Cost Recovery Order were both based on the premise that contract termination in early 1997 was the desired course of action. The new order demonstrates that

defendant no longer accepts this premise, and thus cannot sincerely claim that the Disallowance Order is based on an imprudence determination. However, defendant offers this Court no other rationale besides imprudence for its disallowance of the pass-throughs.

Thus, defendant is attempting to whipsaw plaintiff by assuming these polar positions. Plaintiff is prohibited from terminating the contract because defendant fears the imposition of an exit fee by FERC but yet cannot recover the wholesale rates it has to pay pursuant to that contract in its retail rates. No electric utility can long survive if its retail rates produce less revenue than it has to pay to purchase the power delivered to its retail customers.

In short, defendant cannot have it both ways. It cannot force plaintiff to live under the contract and disallow pass through of plaintiff's wholesale costs validly incurred pursuant to the RS-2 Rate Schedule. It is absolutely clear, therefore, that there is preemption under the filed-rate doctrine, because of FERC's exclusive jurisdiction over the RS-2 Rate Schedule. The provincial views of a state regulatory commission cannot be allowed to thwart federal energy policy as enunciated by FERC in giving approval to interstate and foreign contracts for the purchase of much needed electric power here in the Northeast.[6]

Therefore, so long as plaintiff continues purchasing power pursuant to the RS-2 Rate Schedule and said arrangement is not terminated with FERC's blessing,

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[6] One of the reasons that power costs are high in this little corner of the world is that there is no "cheap" hydro power available here. Conventional power plants with their attendant high costs must be built to "back-up" the hydro plants during the dry seasons. That situation may change dramatically if Canada succeeds in harnessing the highest tides in the world in the Minas Basin at the top of the Bay of Fundy.

defendant must allow plaintiff to pass through its wholesale costs to its retail customers in New Hampshire.

IV. Conclusion

For the preceding reasons, plaintiff's summary judgment motion is granted and defendant's summary judgment motion is denied. Plaintiff is entitled to a permanent injunction mandating that defendant allow plaintiff to pass through to its retail customers its wholesale costs incurred under the RS-2 Rate Schedule. Clearly, as a result of today's ruling, defendant cannot attempt to return to customers the amount of increased rates collected during the period that the April 9, 1998 preliminary injunction was in effect because those rates were properly collected. On the contrary, plaintiff now is entitled to recover the balance of those wholesale rates paid since January, 1997 not already recovered; thus, defendant is additionally mandated to temporarily allow an increment in the retail rates until such recovery is achieved.

Generally, pursuant to Federal Rule of Civil Procedure 54(b), final judgment is not entered until all claims in a case have been resolved. However, as the above discussion illustrates, the Disallowance Order issue decided today is wholly distinct from the remaining claims involving implementation of the Final Plan and the Stranded Cost Recovery Order. There is no telling how much time will elapse before those claims are finally resolved. Given these circumstances, this Court finds that there is "no just reason for delay" in finalizing the relief granted herein. Fed. R. Civ. P. 54(b). Plaintiff is entitled to immediate relief. A judgment containing the permanent injunction delineated herein should be entered forthwith. The attorneys for plaintiff shall draft such a judgment and present it to the Court for entry.

It is so ordered.

/s/ Ronald R. Lagueux
Ronald R. Lagueux
U.S. District Judge
March 6, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-1460

PUBLIC SERVICE OF
NEW HAMPSHIRE, ET AL.,
Plaintiffs,
CONNECTICUT VALLEY ELECTRIC COMPANY and
CENTRAL VERMONT PUBLIC SERVICE
CORPORATION,
Plaintiffs, Appellees,
v.
DOUGLAS PATCH, CHAIRMAN OF THE
STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL.,
Defendants, Appellants.

BEFORE
Torruella, *Chief Judge*,
Bownes, *Senior Circuit Judge*,
Selya, Boudin, Stahl*, Lynch*, Lipez, *Circuit Judges*,

ORDER OF THE COURT
Entered: August 28, 2000

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court
PHOEBE D. MORSE, CLERK

By: Janice M. O'Neil
Chief Deputy Clerk

***Judge Stahl and Judge Lynch are recused from this case and did not participate in this matter**

cc: All Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, NORTH ATLANTIC ENERGY CORPORATION, NORTHEAST UTILITIES, and NORTHEAST UTILITIES SERVICE COMPANY, Plaintiffs, and CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION, Plaintiffs/Intervenors, v. DOUGLAS L. PATCH, Chairman of the Public Utilities Commission of the State of New Hampshire, BRUCE B. ELLSWORTH, Commissioner of the Public Utilities Commission of the State of New Hampshire, and SUSAN S. GEIGER, Commissioner of the Public Utilities Commission of the State of New Hampshire, Defendants.	District of N.H. C.A. NO. 97-97-JD District of R.I. C.A. No. 97-1211.

PRELIMINARY INJUNCTION

This matter is before the Court on the motion of plaintiffs-intervenors Connecticut Valley Electric Company ("Connecticut Valley") and Central Vermont Public Service Corporation ("Central Vermont") for a Temporary Restraining Order and Preliminary Injunction against the New Hampshire Public Utilities Commission ("NHPUC") to allow Connecticut Valley to recover through retail rates the costs for wholesale power requirements service that Connecticut Valley purchases from Central Vermont pursuant to the FERC-authorized RS-2 Rate Schedule.

This Court conducted a hearing on the Connecticut Valley-Central Vermont motion on April 3, 1998, at which time both Connecticut Valley-Central Vermont and the NHPUC presented arguments of counsel. In addition, the Court has considered the legal memoranda, affidavits and exhibits submitted by the parties. The Court finds for the reasons stated on the record at the conclusion of the April 3 hearing that Connecticut Valley-Central Vermont have established each of the prerequisites for preliminary injunctive relief, and

IT IS HEREBY ORDERED that pursuant to Rule 65 of the Federal Rules of Civil Procedure:

1. The NHPUC is directed and required to allow Connecticut Valley to recover through retail rates all costs for wholesale power requirements service that Connecticut Valley purchases from Central Vermont pursuant to its FERC-authorized RS-2 Rate Schedule effective January 1, 1998 until further court order.

2. The Court adopts as its findings of fact and conclusions of law the statements it made on the record at the conclusion of the April 3 hearing.

3. This Court retains jurisdiction over this action and the parties hereto for the purposes of enforcing this injunction and granting such additional relief as may be hereafter necessary or appropriate.

ENTER:

/s/ Ronald R. Lagueux
Chief Judge
Ronald R. Lagueux

April 9, 1998

PER ORDER:

/s/ Illegible

April 9, 1998

United States Court of Appeals
For the First Circuit

No. 98-1629

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, ET AL.,
Plaintiffs, Appellees,

and

CONNECTICUT VALLEY ELECTRIC COMPANY and
CENTRAL VERMONT PUBLIC SERVICE
CORPORATION,
Plaintiffs/Intervenors, Appellees,

v.

DOUGLAS L. PATCH, CHAIRMAN OF THE
STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Ronald R. Lagueux,* *U.S. District Judge*]

Before
Boudin, *Circuit Judge*,
Bownes and Reavley,** *Senior Circuit Judges*.

Dennis Lane with whom *Michael E. Tucci* and *Morrison & Hecker, L.L.P.* were on brief for defendants Douglas L. Patch, Bruce B. Ellsworth and Susan S. Geiger.

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*Of the District of Rhode Island, sitting by designation.

**Of the Fifth Circuit, sitting by designation.

Sarah B. Knowlton, Steven V. Camerino and *McLane, Graf, Raulerson & Middleton, P.A.* on brief for City of Claremont, New Hampshire, Amicus Curiae.

Douglas W. Smith, General Counsel, *John H. Conway*, Deputy Solicitor, and *Deborah B. Leahy* on brief for Federal Energy Regulatory Commission, Amicus Curiae.

Philip T. McLaughlin, Attorney General, *Martin P. Honigberg*, Senior Assistant Attorney General, Civil Bureau, *James K. Brown, John A. Shope* and *Foley, Hoag & Eliot LLP* on brief for Jeanne Shaheen, Governor of the State of New Hampshire, Amicus Curiae.

F. Anne Ross and *F. Anne Ross, P.C.* on brief for Retail Merchants Association of New Hampshire, New Hampshire Office of the Consumer Advocate, Campaign for Ratepayers Rights, Community Action Program, City of Manchester and Cabletron Systems, Inc., Amici Curiae.

Lee A. Freeman, Jr., and *Allan B. Taylor* with whom *John F. Kinney, James T. Malysiak, Glynna W. Freeman, Freeman, Freeman & Salzman, P.C., Joseph M. Kraus*, Vice President and General Counsel, Central Vermont Public Service Corporation, *Dom S. D'Ambruoso, John T. Alexander, Ransmeier & Spellman, John B. Nolan, Allan B. Taylor, Gary M. Becker, Robert W. Clark* and *Day, Berry & Howard* were on brief for appellees Connecticut Valley Electric Company, Central Vermont Public Service Corporation, Public Service Company of New Hampshire, North Atlantic Energy Corporation, Northeast Utilities and Northeast Utilities Service Company.

December 3, 1998

BOUDIN, *Circuit Judge*. On this appeal, we consider whether the district court properly enjoined a state utility commission to allow a specific increase in electric utility rates sought by Connecticut Valley Electric Service Company ("Connecticut Valley"). In timing and background facts, there is considerable overlap between this decision and our companion decision today in No. 98-1764, which arises out of the same district court proceeding. The reader's familiarity with that decision is assumed, but additional background is required to understand the events and legal issues peculiar to Connecticut Valley.

I. BACKGROUND

Connecticut Valley is an electric utility that provides retail service to end-user customers in certain New Hampshire communities. Its rates are set forth in a retail tariff subject to the authority of the New Hampshire Public Utilities Commission ("the Commission"). R.S.A. § 378:7 (1997); *see Legislative Util. Consumers' Council v. Public Serv. Co.*, 402 A.2d 626, 631 (N.H.1979). The company does not generate any electric power; it is part of an integrated public utility system and purchases power from others.

About 76 percent of the power purchased by Connecticut Valley is acquired from its parent company, Central Vermont Public Service Company ("Central Vermont"). Rates and contracts for wholesale transactions

in electric power, assuming an interstate nexus, are normally subject to regulation by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act, 16 U.S.C. §§ 824, 824d (1994). FERC has accepted for filing the tariffs and contract under which Central Vermont supplies power to Connecticut Valley. *See Appeal of Sinclair Mach. Prods., Inc.*, 498 A.2d 696, 698-99 (N.H.1985).

In supplying Connecticut Valley and its own retail customers in Vermont, Central Vermont purchases about 35 to 40 percent of its power under a long-term supply contract with Hydro Quebec. A contract of this kind provide price and supply protection (the Hydro Quebec contract runs until 2016), but also commits the purchaser to buy even if market conditions change. Apparently, the Hydro Quebec contract price now exceeds wholesale electricity prices available in New England, so Connecticut Valley could lower its power costs in the short run if it ceased to buy from Central Vermont.

The existing contract between Connecticut Valley and Central Vermont permits Connecticut Valley to terminate its purchase contract on short notice; oversimplifying slightly, the notice period is one year. Although Connecticut Valley says that the Commission initially encouraged its contract with Central Vermont, the Commission has recently criticized the purchases, saying that the contract was being continued for the benefit of Central Vermont and that the purchases could be regarded as imprudent from Connecticut Valley's standpoint.

In February 1997, when adopting the Final Plan discussed in our companion decision, the Commission's

implementing order as to Connecticut Valley addressed the issue directly. *See* Order No. 22,509. The Commission's order said that in calculating the costs that Connecticut Valley would be able to recover through its own retail rates, the Commission would disallow the cost of power acquired from Central Vermont to the extent that it exceeded the cost of power generally available at wholesale prices in Connecticut and in New Hampshire. *See id.*

Central Vermont responded in June 1997 by initiating a proceeding before FERC to terminate the contract with Connecticut Valley; the request for termination, however, was contingent on FERC's approval of a termination charge by which Central Vermont could effectively impose upon Connecticut Valley a share of the "loss" resulting from the difference between the long-term Hydro Quebec rate and the lesser market rate now available. FERC rejected the Central Vermont proposal, but invited Central Vermont to return to FERC with a differently structured plan for making Connecticut Valley share in some measure in whatever loss resulted from termination.[1]

The next event leading to the present appeal occurred in Fall 1997, when Connecticut Valley submitted

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[1] *See Central Vermont Pub. Serv. Corp.*, Order Rejecting Standard Cost Amendment, 81 F.E.R.C. ¶ 61,336, 1997 WL 779009 (F.E.R.C.), at *1 (Dec. 18, 1997). Central Vermont filed a proposed exit fee with FERC in March 1998. *See Central Vermont Pub. Serv. Corp.*, Order Accepting for Filing and Suspending Proposed Exit Fee Provision, 82 F.E.R.C. ¶ 61,237, 1998 WL 111732 (F.E.R.C.), at *1 (Mar. 11, 1998). FERC accepted the proposal for filing and suspended the fee subject to a hearing which has not yet occurred. *See id.*

tariff changes to the Commission to secure an increase in Connecticut Valley's own retail rates. The purpose of the proposed increase, sought to be made effective on January 1, 1998, was simply to pass through to customers increases in Central Vermont's wholesale rate under its FERC tariff. It appears that the rate charged to Connecticut Valley depended on Central Vermont's own costs of generating and acquiring power, which vary from year to year. The Commission had previously allowed Connecticut Valley to make corresponding increases in its retail rates without much fuss or delay.

This time the story was different. The Commission announced on December 31, 1997, that it would not allow Connecticut Valley to increase its retail rates to take account of the increase in Central Vermont's wholesale rate charged to Connecticut Valley. *See* Order No. 22,815. The Commission's order acknowledged that this would cause a shortfall for Connecticut Valley, but it said that the utility should earlier have terminated its contract with Central Vermont. The Commission said it would later determine what prudently acquired wholesale power should cost Connecticut Valley, creating the threat of an actual decrease in Connecticut Valley's retail rates.

On January 19, 1998, Connecticut Valley and Central Vermont filed a motion in the district court in the pending litigation brought by Public Service Company of New Hampshire ("PSNH"), described in our companion opinion. Connecticut Valley and Central Vermont, along with other utilities in New Hampshire, had already intervened in that case. *See Public Serv. Co. v. Patch*, 173 F.R.D. 17 (D.N.H.1997). In their motion, Connecticut Valley and Central Vermont sought a temporary restraining order

and then a preliminary injunction to require the Commission to put into effect the rate increases that the Commission had disallowed in December 1997.

In the TRO motion, the two utilities argued that the Commission's rejection of the rate increases effectively violated the injunction against the Final Plan previously obtained by PSNH, and further argued that, independent of the district court's prior orders, the Commission's December 31, 1997, order was "preempted" by FERC's exclusive jurisdiction over the wholesale rate contract and over Central Vermont's pending application to modify the contract to impose an exit fee. The motion was also accompanied by affidavits of the two utilities' vice president and the companies' independent auditor attesting to the severe economic harm, including possible bankruptcy of Connecticut Valley, threatened by the Commission's action.

On January 20, 1998, the Commission granted rehearing in the rate proceeding and allowed Connecticut Valley to file additional testimony, but the Commission did not authorize the retail rate increases sought by the utility. In February 1998, the Commission filed papers in the district court opposing the TRO and disputing jurisdiction, the merits, and the predictions of irreparable injury. Further materials were filed by Connecticut Valley and Central Vermont, and on April 3, 1998, the district court held a hearing on the request for a TRO and preliminary injunction.

At the hearing, there were extensive arguments and counsel brought the district court up to date as to intervening developments. The court then took a brief recess

and returned to make extensive oral rulings, generally favorable to Connecticut Valley and Central Vermont. Describing the Commission's conduct as a violation of the court's earlier grant of injunctive relief against the Final Plan, the court directed counsel for the utilities to prepare a preliminary injunction.

On April 9, 1997, the district court entered a formal preliminary injunction adopting its oral rulings as findings of fact and conclusions of law. The injunction specifically directed the Commission to allow Connecticut Valley to recover through retail rates the full cost of wholesale power obtained from Central Vermont pursuant to the latter's FERC tariffs. It appears that since that time – possibly retroactively to January 1, 1998 – Connecticut Valley has been obtaining the increased rates that it sought in its Fall 1997 filing.

The Commission has now appealed from the April 9, 1998, injunction. Its appeal raises threshold objections to the grant of the injunction, it denies that the utilities are likely to prevail on the merits, and it treats very briefly the issue of irreparable injury. We consider the arguments in the same order. The familiar requirements for a preliminary injunction and the standards for appellate review are set forth in our companion decision.

II. DISCUSSION

At the threshold, the strictest limit on the district court's jurisdiction is the Johnson Act, 28 U.S.C. § 1342 (1994). This statute, described more fully in our companion decision, prohibits district court injunctions against state rate orders under certain circumstances. But one of

the circumstances in which the Johnson Act does not bar injunction against a state rate order is where the order is found to be inconsistent with a federal statute or federal agency determination. *See* 28 U.S.C. § 1342(1); *New Orleans Pub. Serv., Inc. v. City of New Orleans*, 782 F.2d 1236, 1242 (5th Cir. 1986), *modified in part*, 798 F.2d 858, *cert. denied*, 481 U.S. 1023 (1987); *see also Aluminum Co. of America v. Utilities Comm'n*, 713 F.2d 1024, 1028 (4th Cir. 1983).

Connecticut Valley is making just such a FERC pre-emption argument in this case. Such a claim is not barred by the Johnson Act. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14 (1983); *New Orleans Pub. Serv.*, 782 F.2d at 1242. This is also true of Connecticut Valley's other claim on the merits – that the district court's earlier injunction against the Final Plan required the Commission to allow the increase; although we have found no case in point, it is unlikely that Congress intended that enforcement of a federal court injunction be barred by the Johnson Act.

The Commission's other threshold arguments are no more persuasive. Even if the modified Final Plan were itself too inchoate to make "ripe" a request to enjoin it – and we hold otherwise in our companion decision – the Commission's action in rejecting the Connecticut Valley rate increase is a formal agency rate action that has an immediate effect. *See generally Abbott Labs. v. Gardner*, 387 U.S. 136, 149-51 (1967). Of course, the possibility that it might be corrected by the Commission itself or by a state court might raise exhaustion concerns; but those are not very powerful in the face of a claim that the rejection violates FERC authority, and that it is going to cause immediate irreparable injury to the utility. *Cf. Bowen v.*

City of New York, 476 U.S. 467, 483-84 (1986); *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976).

The Commission also argues inventively that its December 31, 1997, order is akin to the so-called suspension orders by which federal agencies, under statutes authorizing this step, temporarily delay ("suspend") a carrier or utility increase rate while investigating it. *E.g.*, 16 U.S.C. § 824d(e). As a matter of federal administrative law, a refusal by the regulatory agency to suspend rates under these statutes is usually (but not always) deemed unreviewable because the order is an interim measure and the shipper or customer is usually made whole automatically if the rate increase is ultimately found unjustified.[2]

The present situation is in no way akin to these cases. Although the Commission's December 31, 1997, order did suspend the tariffs, it also made a formal determination to disallow the increase on the ground that it was imprudent for Connecticut Valley to continue its contract. *See* Order No. 22,815. This disallowance was *final* and is not akin to a mere suspension; the further investigation contemplated by the Commission's order was directed not to

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[2] *See United States v. SCRAP*, 412 U.S. 669, 690-92 (1973); *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658, 667 (1963); *see also Cities of Carlisle and Neola, Iowa v. FERC*, 704 F.2d 1259, 1262-63 (D.C.Cir. 1983) (reheard after FERC order became final, 741 F.2d 429). It is far from clear that the same doctrine automatically prohibits the carrier or utility from seeking review of an order that *does* suspend its rate increase tariff, although the agency's broad discretion in imposing this time-limited suspension would ordinarily defeat judicial review.

possible approval of the increase but to the possibility that a *further* reduction might be ordered.

In its last threshold objection, the Commission asserts that the district court erred in considering the utilities' request as a "related" case to be heard by the same judge considering the original action brought by PSNH. It is sufficient to say that the two matters involve a substantial overlap, amply qualifying for consolidation under the terms of Local Rule 42.1(a) & (c) of the New Hampshire District Court. This is so even though we ultimately conclude that the December 31, 1997, order is not to be treated as an implementation of the Final Plan.

We turn now to the merits, or, more precisely, the requirement that the party seeking injunctive relief show that it is likely to prevail on the merits. *See Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996). The first ground urged by the utilities in their brief is that the April 9, 1998, injunction is justified as an extension of the earlier injunctive relief secured by the PSNH against the Final Plan. The district court itself, at the April 3, 1998, hearing, described the Commission's December 31, 1997, order as an "end run" around the earlier injunction.

It is true that the Commission discussed the imprudence of the Connecticut Valley-Central Vermont contract in its order implementing the Final Plan; and both the December 31, 1997, order and the Final Plan reflect a common desire to hold down customer rates. Nevertheless, the disallowance of the specific increase does not purport to rest on the Final Plan and is expressed as an exercise of conventional cost-based rate regulation –

whether or not a lawful exercise is another matter. Thus, the injunction of April 9, 1997, requiring the rate increase, cannot be defended as enforcing the earlier injunction against the Final Plan.

What would support a preliminary injunction requiring the rate increase is a determination that the December 31, 1997, order would itself likely be found to violate the Federal Power Act or otherwise would contravene FERC's authority. The two utilities have argued forcefully that the December 31, 1997, order does violate federal law in two respects: by disregarding FERC's authority to determine what is a just and reasonable wholesale rate and by interfering with FERC's authority to impose a termination charge on Connecticut Valley.

The first of these two FERC-preemption arguments is expressed by the two utilities as a claim that the Commission has "violated the filed-rate doctrine" in its December 31, 1997, order rejecting the rate increase. The "filed rate" locution is commonly used in the case law (and in more than one way), but it is merely a shorthand as likely to confuse as to assist analysis.[3] Indeed, the label is somewhat misleading, since the doctrine on which the utilities here rely is not limited to rates.

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[3] The phrase initially referred to the proposition that a shipper was bound to pay the tariff rate on file with the agency regardless of private understandings with the carrier, unless and until that rate was found to be unlawful. *See, e.g., Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939); *Pennsylvania R. Co. v. International Coal Co.*, 230 U.S. 184, 196-97 (1913). Only later was the phrase used by the Supreme Court, as it is used here by the utilities, to explain preemption of attempted state regulation.

Rather, the Supreme Court has ruled that where the FERC has lawfully determined a rate, allocation, or other matter, a state commission cannot take action that contradicts that federal determination. And even without explicit federal approval of a rate, the Court has treated a rate reflected in a FERC tariff as setting a rate level binding on a state commission in regulating the costs of the purchasing utility. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373-74 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-66 (1986); *cf. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951).

The difficulty for Connecticut Valley is that the Commission did not disallow its retail rate increase on the ground that the wholesale rates charged by Central Vermont were unjust or unreasonable. Rather, the Commission found that it is imprudent for Connecticut Valley to continue purchasing from Central Vermont since lower cost sources of energy are allegedly available – even if Central Vermont's wholesale rate might be just and reasonable in the conventional (regulatory) sense that that rate merely covers Central Vermont's own acquisition costs.

The Supreme Court has never squarely decided the question of whether imprudence is an escape hatch from the Commission's otherwise existing obligation to respect FERC's authority to determine the just and reasonable rate. But the Court has twice said that it would assume *arguendo* that such escape hatch existed; the Third Circuit has so held; and FERC has concurred, citing prior cases of its own. *See Mississippi Power & Light*, 487 U.S. at 373-74; *Nantahala Power & Light*, 476 U.S. at 972; *Kentucky W. Va.*

Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F.2d 600, 609 (3d Cir. 1988); *Palisades Generating Co.*, 48 FERC ¶ 61,144, at 61,574 and n. 10 (1989). We agree with FERC.[4]

Connecticut Valley says that the present situation is different because it is *required* to purchase from Central Vermont under a contract filed with FERC itself. It is arguable that the Commission could not disregard a long-term commitment by Connecticut Valley if FERC had blessed a contract that contained such a commitment, *cf. Mississippi Power & Light*, 487 U.S. at 373-74; *Nantahala Power & Light*, 476 U.S. at 972; but here the contract filed with FERC itself contains a provision allowing Connecticut Valley to extract itself on one year's notice.

In the district court, the utilities made an alternative argument for preemption, namely, that Central Vermont is seeking to impose some kind of an exit fee in proceedings before FERC, and the Commission's action in this case is trespassing on FERC's authority to impose such a fee. As noted, FERC has in fact indicated that it may

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[4] In an amicus brief filed in this case, FERC in substance repeated the position that it took in an earlier order in Central Vermont Pub. Serv. Corp., Order Accepting Filing and Granting Request for Clarification, 84 F.E.R.C. ¶ 61,194, 1998 WL 765497 (F.E.R.C.), at *1 (Aug. 21, 1998), where it said: "We also clarify that the Commission's approval of the RS-2 rate schedule does not preclude the Public Utilities Commission of the State of New Hampshire (New Hampshire Commission) from determining whether Connecticut Valley acted imprudently by not terminating the rate schedule under its terms where lower-priced power was available to Connecticut Valley. In making this clarification, the Commission takes no position on whether Connecticut Valley had available other power supply choices, or whether Connecticut Valley acted imprudently."

entertain such a proposal, *see* 82 F.E.R.C. at ¶ 61,237, at 1998 WL 111732 (F.E.R.C.), at *1, and no doubt termination without an exit fee could leave Central Vermont customers to bear the full brunt of the higher cost power. But nothing in the state commission's December 31, 1997, order precludes FERC from imposing such a fee.

In sum, Connecticut Valley and Central Vermont have not shown likelihood of success on the merits, or even of fair ground for further litigation, in claiming that the December 31, 1997, order violates federal law insofar as it disallows the increase sought. That disallowance is the only issue on appeal in this case; if reductions of Connecticut Valley rates below existing levels are ordered, it will be time enough to consider whether they are precluded by the district court's injunction against the Final Plan or on other grounds.

If taken at face value, the claims of irreparable injury made by Connecticut Valley and Central Vermont are serious. The Commission's brief merely argues that Connecticut Valley had alternative means of relief – to appeal the Commission's orders to the state supreme court and to collect the higher rate pending appeal, subject to the filing of a bond. The utilities say that these options will not work. In all events irreparable injury is not itself a basis for injunction, absent some claim likely to succeed on the merits in the federal court action.

If we have misapprehended Connecticut Valley's arguments on the merits, it is free to petition for reconsideration; and a timely petition for reconsideration will stay the mandate – and thus maintain the April 12, 1998, injunction in effect until the petition is disposed of. Fed.

R.App. P. 41(a). However, if Connecticut Valley does face the kind of calamity it predicts, it would be wise to consider at once its alternative remedies at FERC or through discussion with the Commission.

Accordingly, the April 12, 1998, injunction is *vacated*. The Commission is entitled, once the mandate becomes effective, to require Connecticut Valley to reduce rates back to the level prevailing on December 31, 1997.

It is so ordered.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 19, 1999

Mr. Michael E. Tucci
Morrison & Hecker
1150 18th Street, NW #800
Washington, DC 20036

Re: Connecticut Valley Electric Company, et al.
v. Douglas L. Patch, Chairman, New Hampshire
Public Utilities Commission, et al.
No. 98-1291

Dear Mr. Tucci:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely

/s/ William K. Suter
William K. Suter, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.,	)	
Plaintiffs,	)	District of N.H. C.A. NO. 97-97-JD
And	)	District of R.I. C.A. NO. 97-121-L
CONNECTICUT VALLEY ELECTRIC COMPANY AND CENTRAL VERMONT PUBLIC SERVICE CORPORATION	)	
Plaintiffs/ Interveners,	)	
v.	)	
DOUGLAS L. PATCH, et al.	)	
Defendants.	)	

ORDER

Having reviewed the submissions by the parties and hearing argument in open court on April 7, 1999, with respect to the NHPUC's Motion to Dissolve Amended Restraining Order and Preliminary Injunction and the Opposition of Central Vermont/Connecticut Valley requesting clarification of the outstanding injunction entered on June 12, 1998,

IT IS HEREBY ORDERED that the NHPUC's Motion is denied. The preliminary injunction, which was entered to prevent the NHPUC from taking actions to force New Hampshire utilities off cost-based rate making and to maintain the *status quo ante* until this case can be heard on the merits, and which has been affirmed by the First Circuit Court of Appeals, shall remain in full force and effect.

IT IS FURTHER ORDERED that, for the reasons stated by the Court in the several hearings conducted on April 3, and June 5, 1998 and April 7, 1999, and pursuant to the dictates of the First Circuit in its related decision vacating this Court's April 9, 1998 injunction, the outstanding injunction prevents the NHPUC from taking any action that requires Connecticut Valley to reduce its rates below the level prevailing on December 31, 1997. Moreover, the Court makes the following findings:

1) The First Circuit reversed this Court's April 9, 1998 injunction requiring the NHPUC to allow Connecticut Valley to collect RS-2 rates from its retail customers, but held that the NHPUC could not reduce Connecticut Valley's rates below the December 31, 1997 level without further judicial review. In this respect, the Court of Appeals stated that "if reductions of Connecticut Valley's rates below existing levels are ordered, it will be time enough to consider whether they are precluded by the District Court's injunction against the Final Plan or on other grounds." *Public Service Co. of New Hampshire v. Patch*, 167 F.3d 29, 36 (1st Cir. 1998).

2) The NHPUC has entered orders requiring Connecticut Valley to lower its retail rates to a level below that prevailing on December 31, 1997. This action violates the terms and purpose of the injunction entered by this Court on June 12, 1998.

3) The NHPUC's orders have resulted in, and continue to cause, irreparable harm to Connecticut Valley and Central Vermont. Plaintiffs have submitted uncontradicted evidence that, as a result of the NHPUC's orders: (i) Connecticut Valley was forced to take $3,700,000 of after-tax write-offs as of December 31, 1998, which caused Citizens Bank to notify Connecticut Valley that it is in default of its $3,750,000 obligation to the Bank; (ii) Connecticut Valley no longer has access to capital markets for operating funds to maintain its business and serve its customers; and (iii) Arthur Andersen, Connecticut Valley's and Central Vermont's independent auditor, intends to issue a "going concern" opinion regarding Connecticut Valley's 1998 financial statement.

4) The RS-2 Rate Schedule, by its own formula and mechanism, periodically adjusts Central Vermont's wholesale power cost. By enforcing the RS-2 Rate Schedule, and the adjustments which allow recovery of those costs in retail rates, until resolution of the challenges that have been made to New Hampshire's restructuring, the April 9, 1998 injunction was designed to maintain the *status quo*, and to permit the Rate Schedule to continue operating, not mandate a rate increase.

5) This Court has articulated the additional and separate reasons, including (i) Central Vermont's showing of irreparable harm and (ii) the NHPUC's shifting of stranded costs across state lines, that NHPUC should not be permitted to deny Connecticut Valley the right to recover rates sufficient to cover its cost of service, including the costs for all wholesale power purchased under the RS-2 Rate Schedule. However, given the direction from the Court of Appeals, the Court can do no more than enforce its June 12, 1998 injunction and direct the NHPUC not to take any action that reduces Connecticut Valley's rates below the level prevailing on December 31, 1997.

ENTER:

/s/ Ronald R. Lagueux
RONALD R. LAGUEUX, C.J.

Dated: May 10, 1999

PER ORDER:

/s/ Illegible

Dated: May 11, 1999

United States Court of Appeals
For the First Circuit

No. 99-1754

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, ET AL.,
Plaintiffs,

and

CONNECTICUT VALLEY ELECTRIC COMPANY and
CENTRAL VERMONT PUBLIC SERVICE
CORPORATION,
Intervenors, Appellees,

v.

DOUGLAS L. PATCH, CHAIRMAN OF THE
STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL.,
Defendants, Appellants.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Ronald R. Lagueux,* *U.S. District Judge*]

Before
Selya, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Boudin, *Circuit Judge*.

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*Of the District of Rhode Island, sitting by designation.

Michael E. Tucci, with whom *Steven K. White*, *Morrison & Hecker L.L.P.* and *Gary Epler*, General Counsel, New Hampshire Public Utilities Commissioner, were on brief for defendants, appellants Douglas L. Patch, Susan S. Geiger and Nancy Brockway, Chairman and Commissioners of the State of New Hampshire Public Utilities Commission.

Lee A. Freeman, Jr. with whom *John F. Kinney*, *James T. Malysiak*, *Glynna W. Freeman*, *Freeman, Freeman & Salzman, P.C.*, *Joseph M. Kraus*, Senior Vice President and General Counsel, Central Vermont Public Service Corporation, *Dom S. D'Ambruoso*, *John T. Alexander* and *Ransmeier & Spellman* were on brief for intervenors, appellees Connecticut Valley Electric Company and Central Vermont Public Service Corporation.

January 24, 2000

BOUDIN, *Circuit Judge*. This appeal is a sequel to prior litigation growing out of the same district court proceeding.[1] Once again, the issues relate to interim matters; the merits have not yet been decided in the district court. To avoid repetition, familiarity with our prior decisions is assumed; and we confine ourselves to a bare-bones summary limited to events necessary for this appeal.

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[1] *Public Serv. Co. of New Hampshire v. Patch*, 962 F. Supp. 222 (D.N.H. 1997) (*Patch I*); *Public Serv. Co. of New Hampshire v. Patch*, 173 F.R.D. 17 (D.N.H. 1997) (*Patch II*); *Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197 (1st Cir. 1998) (*Patch III*); *Public Serv. Co. of New Hampshire v. Patch*, 167 F.3d 15 (1st Cir. 1998) (*Patch IV*); *Public Serv. Co. of New Hampshire v. Patch*, 167 F.3d 29 (1st Cir. 1998) (*Patch V*), *cert. denied*, 119 S. Ct. 1458 (1999).

In 1997, acting under recently enacted state legislation, the New Hampshire Public Utilities Commission ("the Commission") issued a plan and implementing orders to restructure electric power regulation in the state. The new regime, aimed at promoting competition through various means including market-based rates, created a risk that existing utilities might not be able to recover their full investment in previously built facilities. The largest utility in the state, Public Service Company of New Hampshire ("PSNH"), obtained a preliminary injunction in the district court based, *inter alia*, on a colorable claim that the state's action violated a specific agreement with that company and so also violated bankruptcy court orders and the Contract Clause of the U.S. Constitution. *See Patch IV*, 167 F.3d at 21, 26, 28.

In our principal decision issued in 1998--*Patch IV*--we upheld this preliminary injunction and, with somewhat greater reluctance, its extension by the district court to other New Hampshire utilities that had intervened, including Connecticut Valley Electric Company ("Connecticut Valley"). *Id.* at 27-29. However, in the same proceeding, the district court had also ordered the Commission to allow a specific rate increase sought by Connecticut Valley to recover increased power costs which the Commission had previously disallowed in December 1997, *see Patch V*, 167 F.3d at 32-33; in our companion decision--*Patch V*--we vacated the district court's injunction in this respect, holding that Connecticut Valley had not shown a likelihood of prevailing in federal court on this aspect of the case. *Id.* at 36.

Following our decisions, the Commission and PSNH engaged in negotiations and have been moving toward a possible settlement of their differences. While proceedings in the district court as to a permanent injunction for PSNH have been deferred pending approval of the settlement, litigation between the Commission and Connecticut Valley has moved

forward; several months ago both sides argued cross-motions for summary judgment on the merits of permanent relief. During this same period, two new and quite distinct disputes have arisen--one relating to the preliminary injunction upheld in *Patch IV* and the other to the further interim relief that we disallowed in *Patch V*.

The first of these two disputes stems from a new motion filed by the Commission after *Patch IV* asking the district court to vacate its earlier injunction barring the New Hampshire restructuring plan. That injunction had rested primarily, as preliminary injunctions normally do, *see Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996), on a showing of likelihood of success on the merits coupled with a showing of threatened irreparable injury. The irreparable injury showing, initially made by PSNH, rested in part on an accounting convention regarding the financial treatment of so-called regulatory assets; according to PSNH's affidavits, the proposed New Hampshire restructuring plan would have triggered changes in the company's financial statements, placing it in immediate default on huge bank loans.

Our decision in *Patch IV* affirming the preliminary injunction against the restructuring plan was rendered on December 3, 1998. On January 18, 1999, the Commission moved to vacate the injunction, primarily on the ground that changes in accounting treatment by the Financial Account Standards Board had eliminated the threat relied upon by PSNH in its original showing of irreparable injury. Connecticut Valley vigorously opposed the motion. The district court's decision on this motion is the first issue on this appeal.

The second dispute arises in the wake of our decision in Patch V vacating a different aspect of the district court's *pendente lite* relief. As noted above and explained in detail in

Patch V, even before its restructuring plan was scheduled to be implemented, the Commission had disallowed an attempt by Connecticut Valley in December 1997 to implement a specific rate increase designed to pass along to its customers a routine increase in the cost of power it purchases from its parent and wholesale supplier, Central Vermont Public Service Company ("Central Vermont"). The Commission took the view that while the increase in Connecticut Valley's costs was real, purchasing from Central Vermont was no longer prudent because power could currently be bought for less on the open market. 167 F.3d at 32. Connecticut Valley had a long-term requirements contract with Central Vermont, but the Commission deemed it to be terminable on short notice.

Without sharply distinguishing between this specific disallowance by the Commission and its far-reaching restructuring plan, the district court in April 1998 directed the Commission to allow the increase. It was this further preliminary relief that we found not to be justified because (in our view) Connecticut Valley had failed to show that it was likely to prevail on the merits in its ultimate challenge to this disallowance in federal court. Our *Patch V* decision vacated this aspect of the district court's preliminary injunction, thereby permitting the Commission to roll back Connecticut Valley's retail rates to the pre-1998 level, *see* 167 F.3d at 36.

The Commission not only rolled back the rate increase but also ordered further temporary reductions by Connecticut Valley, below the level prevailing in December 1997, in order to flow back to customers the amount of the increases that had been collected between the time of the district court's injunction with respect to the disallowance and the later vacation of that injunction in *Patch V*. Connecticut Valley then asked the district court to enjoin the Commission from requiring this further reduction until the district court decided the merits of Connecticut Valley's

request for a permanent injunction requiring the Commission to allow the company to charge rates sufficient to cover all of its costs. The commission opposed the request.

On April 7, 1999, after a hearing, the district court entered an order refusing to dissolve the preliminary injunction upheld in *Patch IV* and granting in substance the additional relief sought by Connecticut Valley to defer any flow-back of the increase that the company had collected before this court vacated the district court's April 1998 injunction in that respect in *Patch V*. The district court did not discuss at length its reasons for the first of these actions; but it wrote several paragraphs of findings and explanations with respect to the second. The Commission now appeals, challenging both aspects of the district court's order.

On this appeal, little need be said about the district courts refusal to modify the preliminary injunction enjoining the Commission's restructuring plan. PSNH's original showing of irreparable injury did depend in part on the issue of the then-current accounting treatment of so-called regulatory assets; but the threatened accounting treatment merely accelerated and made more dramatic the adverse consequences of the plan for PSNH. It was credibly alleged, at least sufficiently for preliminary relief, that the restructuring plan, as framed at the time, would prevent PSNH from ever recovering very substantial prior investments assertedly protected by a specific contract with the state and by implementing orders of the bankruptcy court.

When in early 1998 Connecticut Valley joined PSNH in seeking interim relief, it provided arguments and affidavits of its own to demonstrate the harm that the restructuring plan would do to it. Once again, the projected accounting treatment of regulatory assets was one of several strands in the showing of harm to Connecticut Valley. But, as is shown by even a brief review of the company's motion papers, it was

certainly not the only one--nor was the greatest dollar impact on the company attributed to this accounting requirement.

As we pointed out in *Patch IV*, 167 F.3d at 23, 28, the Commission made little effort to challenge the showing of irreparable injury by either PSNH or Connecticut Valley. Only the most significant change in circumstances would require the district court to revisit that issue. Yet the change in accounting treatment now trumpeted by the Commission was apparently made in July 1997, over a year *before* our decision in *Patch IV* upholding the same injunction. If the Commission thought that this adjustment changed everything, it certainly should have stressed this in its original appeal in *Patch IV*, or asked for a remand to consider the effect of the change. In any event, the district court did not abuse its discretion in refusing to modify the preliminary injunction based on the accounting change.

The district court's new prohibition of the Commission's further reduction in Connecticut Valley's rates is an entirely different matter. In part, the company's defense of this new relief rests on a narrow ground, namely, on case law that the company argues allows a court to defer claims of restitution stemming from a vacated preliminary injunction until the merits have been decided.[2] However, Connecticut Valley's defense also involves a view of our prior decisions in

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[2] *See Grupo, Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 119 S. Ct. 1961, 1966 (1999) (noting that usually, if a plaintiff is found to be entitled to a permanent injunction, the earlier improper issuance of a preliminary injunction is harmless error); *Polymer Tech. Corp. v. Mimran*, 975 F.2d 58, 64 (2d Cir. 1992) ("[A]n award from an injunction bond prior to final judgment is premature."); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990) (noting that to decide whether a preliminary injunction was wrongfully issued, the court should analyze whether, "in hindsight in light of the ultimate decision on the merits after a full hearing, the injunction should not have issued in the first instance").

Patch IV and *V* that is not consistent with those decisions and may have implications for any further interim disputes and possibly for the merits of this case. For this reason, we revisit briefly the scope and rationale of our earlier decisions.

Ordinarily, a district judge has a great deal of freedom to impose interim relief and, in particular, to preserve the status quo in all matters properly before it. But efforts by utilities to enjoin state rate orders are not ordinary cases and relief--interim or permanent--is severely restricted, especially by the so-called *Burford* abstention doctrine, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and by the Johnson Act, 28 U.S.C. § 1342 (1994). Broadly speaking, the staples of utility-company appeals--attacks under state law or based on due process--are severely limited when made in federal courts. *See Patch IV*, 167 F.3d. at 24-25. PSNH barely threaded its way through this maze of limitations in obtaining a preliminary injunction against the restructuring plan--relief extended to the other utilities partly based on defaults by the Commission. *Id.* at 28.

However, thus far in the district court neither PSNH nor any other company has justified relief--consistent with *Burford* and the Johnson Act--against any rate orders of the Commission *except* its attempts to implement the restructuring plan. The orders of the Commission refusing to allow Connecticut Valley to recover the cost increases imposed by Central Vermont are *not* orders implementing that plan, which is why in *Patch V* we vacated the further relief granted by the district Court. This is equally true of the Commission's latest order lowering rates temporarily below the December 1997 rate to refund the amounts collected under the vacated *Patch V* injunction.

In its brief and at oral argument, Connecticut Valley made clear that it thinks that the district court has assured the company *pendente lite* of its right to collect "its costs," a goal

frustrated in part by this court's supposed failure to understand that cost recovery is the status quo that the district court has sought to preserve. However, what *Patch IV* and *V* sought to make clear is that no such assurance is valid; the district court's injunctive relief was sustained only against orders implementing the restructuring plan. If injunctive relief is to extend beyond such orders, it must be independently justified. True, the restructuring plan and the disallowance and refund orders against Connecticut Valley both may undermine cost recovery; but the former has been validly enjoined *pendente lite* and the latter has not.[3]

This leaves open the possibility that the district court's latest action deferring any refund can be justified on a narrower set of grounds. The decisions relied on by Connecticut Valley, *see* note 2 above, reflect a common-sense policy that allows a district court to wait until the end of a case to undo any mischief wrought by interim relief it granted in error. This often makes sense because the final outcome may affect the amount of any restitution or damage relief, or show that nothing at all should be repaid, even though the preliminary relief was wrongly granted in the first place.

But here the district court is not deferring a restitution order of its own; it is enjoining the Commission from ordering restitution on the Commission's own authority. Agencies like the Commission often require refunds of rates "wrongly" collected. Unless the original Commission order

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[3] The status quo with respect to the restructuring plan is not to implement that plan. The fact that the status quo is disturbed in other respects by Commission orders—e.g., by the disallowance of cost recoveries previously allowed as prudent (the issue in *Patch V*) or by the refund order (at issue here)--does not offend the district court's injunction insofar as it was sustained in *Patch IV*. This does not mean that the latter orders are lawful but only that grounds for a federal injunction against them have not yet been made out.

disallowing the Connecticut Valley increase is vulnerable to injunction *by a federal court*, it is hard to see what authority a federal court has to defer the Commission-ordered refund. And, as we explained in *Patch V*, 167 F.3d at 35-36, Connecticut Valley has not yet made such a showing of likely vulnerability as to the disallowance order.

This is not because the Commission's disallowance order is sound. At best, the state agency may be exploiting a possible drafting mistake--the short-notice termination clause in the original contract between the two utilities--to shift to Central Vermont (or to Vermont ratepayers) what may well have been Connecticut Valley's prudently incurred costs of achieving long-term rate protection for its New Hampshire customers. *See Patch V*, 167 F.3d at 36. It so, there may be a remedy available to Connecticut Valley in state court and, in any event, if central Vermont prevails at the Federal Energy Regulatory Commission ("FERC") and is allowed to impose a termination charge on Connecticut Valley, the Commission may be forced to retreat from its effort to compel the contract termination, thereby undermining its rationale for its disallowance order.

Nevertheless, given the limitations imposed by *Burford* and the Johnson Act, it remains unclear why Connecticut Valley thinks that it can overturn the disallowance order in federal court. Its own Contract Clause argument is quite different from that of PSNH, which implicated a specific bankruptcy settlement formally approved by the state; and, lacking a connection to federal bankruptcy orders, Connecticut Valley's Contract Clause claim may, even if otherwise sound, face some difficulty in federal court given the broad language of the Johnson Act. *See Patch IV*, 167 F.3d at 24-25. Nor has the company yet been able to explain plausibly, at least to us, how the disallowance order conflicts with a federal statute or FERC

order--claims admittedly likely to avoid the Johnson Act's bar. *See Patch V*, 167 F.3d at 33-34.

On this record, we are no more able to sustain the injunction against the Commission's new refund order than we were to sustain the earlier injunction against the underlying disallowance that we vacated in *Patch V*. But the district court may be on the verge of supplying the missing explanation in deciding the merits of the now-submitted cross-motions for summary judgment. Based on its orders respecting the disallowance and the refund, the district court seemingly believes that both measures are vulnerable to a federal injunction, despite the Johnson Act, and it may be on the verge of making clear why.

It is thus possible that in the near future the district court will grant permanent injunctive relief, requiring the Commission to allow cost pass-throughs of Central Vermont cost increases; and if so it would be very odd to have refunds, inconsistent with such an injunction, made effective in the next several months. For this reason, we have determined not to vacate the district court's injunction against the refund order ourselves but instead to remand this aspect of the case to the district court for further proceedings consistent with this opinion. *Cf. SEC v. Lehman Bros., Inc.*, 157 F.3d 2, 9 (1st Cir. 1998).

On remand, the district court may defer vacation of this injunction against the refund order for up to 90 days. If within that period it has decided the merits of the request for a permanent injunction in a way inconsistent with refunds, or has taken any other action that provides a showing that the company is likely to prevail on the merits in federal court in barring the refunds, it may enter a superceding injunction against the refund order, which the Commission may then appeal to us. Otherwise, no later than the end of the 90-day

period, the district court must vacate its present injunction insofar as it enjoins the Commission's refund order.

The district court's refusal to modify the injunction insofar as it prohibits implementation of the restructuring plan is *affirmed*; insofar as the district court has enjoined the Commission's refund order, the matter is *remanded* for further proceedings consistent with this opinion.

It is so ordered.

DR 96-150

STATEWIDE ELECTRIC UTILITY RESTRUCTURING PLAN

Order *Nisi* Vacating Portions of Interim Stranded Cost Orders Related to Wholesale Requirements Contracts

ORDER NO. 22,986

July 22, 1998

I. BACKGROUND

By Order No. 22,514 (February 28, 1997), the New Hampshire Public Utilities Commission (Commission) issued a Statewide Electric Utility Restructuring Plan (Plan) pursuant to RSA 374-F.[1] On the same date, the Commission established interim stranded cost charges (ISC charges) for each jurisdictional utility consistent with the legal and policy decisions announced in the Plan and the factual circumstances of each utility.[2]

The Plan included a legal analysis addressing, *inter alia*, claims by electric utilities that the Federal Power Act (FPA) requires the Commission to set stranded cost charges which are designed to recover all costs associated with wholesale purchase power contracts approved by the Federal Energy Regulatory Commission (FERC).[3] The Commission determined that its jurisdiction had to be decided on a case-by-case basis, but that the FPA did not

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[1] RSA 374-F directed the Commission to develop a statewide restructuring plan no later than February 28, 1997.

[2] ISC charges for CVEC, Unitil and GSEC were set by Order Nos. 22,509, 22,510 and 22,511, respectively.

[3] *See* Plan at 25-51.

inherently prevent the Commission from disallowing the recovery of costs under certain circumstances.

The ISC orders pertaining to CVEC, GSEC and Unitil directed each of those companies to notify their affiliated wholesale requirements suppliers of their intent to terminate the foregoing contracts. The Commission allowed GSEC and Unitil to fully recover the above-market portion of their wholesale power costs on an interim basis, but in the case of CVEC disallowed recovery of costs related to the requirements contract with its parent supplier, Central Vermont Public Service Corporation (CVPS).[4] The Commission noted that CVEC should have provided notice to terminate the contract pursuant to its right to do so – and that by so doing, it would have fully mitigated the wholesale power costs from CVPS as of January 1, 1988, the date the ISC charge was expected to have gone into effect.

In Order No. 22,875 (March 20, 1998), the rehearing order on restructuring, the Commission affirmed its decision to address on a case-by-case basis the above-described jurisdictional preemption claims by utilities. The Commission noted that its order did not bar utilities from recovering unmitigatable costs associated with purchased power obligations; rather, the Commission decided to defer making final determinations on such questions until examining utility-specific claims on a case-by-case basis. The Commission also reiterated that utilities were expected to take all reasonable measures to

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[4] The Commission did, however, allow full recovery of costs incurred under QF contracts with CVEC.

mitigate or avoid incurring costs associated with existing wholesale contracts.[5]

II. DISCUSSION

Recently, the FERC issued a decision concerning a dispute between PSNH and NHEC which affects a utility's continuing purchase obligation under a wholesale requirements contract[6]. The fundamental issue addressed by FERC in that decision was whether NHEC must continue to pay for power to the degree needed to meet the energy needs of all of its retail customers – even after customers begin to purchase power from alternative suppliers pursuant to RSA 374-F. The FERC determined that the Amended Partial Requirements Agreement (APRA) obligates NHEC to purchase from PSNH only as much power as NHEC needs to serve those retail customers who remain its customers. The FERC also rejected an alternative request by PSNH for wholesale stranded cost recovery under Order No. 888.[7]

We recognize that FERC's decision was limited to the PSNH-NHEC requirements contract; however, the decision has obvious implications for other New Hampshire electric utilities with similar requirements contracts. For instance, in the absence of a contractual obligation to the

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[5] In the same rehearing order the Commission affirmed the ISC orders for CVEC, GSEC and Unitil.

[6] *See* Public Service Company of New Hampshire, 83 FERC 61,223 (May 29, 1998).

[7] *Ibid.*

contrary, the decision suggests that wholesale requirements customers are contractually obligated to purchase power only to the extent needed to serve their retail power supply customers. This could mean that a wholesale requirements customer (such as NHEC, GSEC, Unitil or CVEC) may have no stranded cost liability to its wholesale supplier when retail customers of the requirements customer purchase power from alternative suppliers. The decision also implies that it is unnecessary for utilities to terminate their requirements contracts in order to implement retail access in a manner that fully mitigates potential stranded costs as required by RSA 374-F. Accordingly, we vacate our prior directives to GSEC[8], Unitil and CVEC to provide notice of termination consistent with the terms of their wholesale requirements contracts. However, we reiterate that utilities have a statutory obligation to take all reasonable measures to mitigate stranded costs.

Based upon the foregoing and for good cause shown, it is hereby

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[8] We note that vacating our ISC order for GSEC should have no effect on GSEC or New England Power Company, its affiliated wholesale power provider, based on our recent approval of GSEC's letter of acceptance to our modifications to the Offer of Settlement in Docket No. DR 98-012. Effective July 1, 1998, the retail access date, NEP ceased providing GSEC all requirements service under its wholesale power tariff, FERC Electric Tariff, Original Volume No. 1, and now provides GSEC with service in accordance with Appendix 1 to NEP's and GSEC's Amendment to Service Agreement, which was filed at the FERC on February 3, 1998, Docket No. ER98-2023-000. The FERC accepted the filing and Appendix 1 on April 28, 1998.

ORDERED *NISI,* that the directive to CVEC to provide notice to terminate in Order No. 22,509 is vacated unless the Commission orders otherwise; and it is

ORDERED *NISI,* that the directive to Unitil to provide notice to terminate in Order No. 22,510 is vacated unless the Commission orders otherwise; and it is

ORDERED *NISI,* that the directive to GSEC to provide notice to terminate in Order No. 22,511 is vacated unless the Commission orders otherwise; and it is

FURTHER ORDERED, that the foregoing discussion supplements the Commission's prior legal analysis in the Plan and in Order No. 22,875; and it is

FURTHER ORDERED, that the Executive Director and Secretary shall provide a copy of this Order *Nisi* to all parties and persons on the service list in this docket; and it is

FURTHER ORDERED, that any interested person may submit their comments or file a written request for a hearing on this matter before the Commission no later than July 31, 1998;

FURTHER ORDERED, that this Order *Nisi* shall be effective on July 22, 1998, unless the Commission provides otherwise in a supplemental order.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of July, 1998.

/s/ Douglas L. Patch (CR)
Douglas L. Patch
Chairman

/s/ Bruce B. Ellsworth
Bruce B. Ellsworth
Commissioner

/s/ Susan S. Geiger
Susan S. Geiger
Commissioner

Attested by:

/s/ Thomas B. Getz
Thomas B. Getz
Executive Director and Secretary

DR 97-241

CONNECTICUT VALLEY ELECTRIC COMPANY

Fuel and Purchased Power Adjustment Clauses

Order Reinstating Rates and Directing Calculation of Refunds

ORDER NO. 23,168

March 22, 1999

APPEARANCES: Kenneth Picton, Esq. for Connecticut Valley Electric Company; Ransmeier and Spellman by Dom S. D'Ambruoso, Esq. and John T. Alexander, Esq. on behalf of Connecticut Valley Electric Company; McLane, Graf, Raulerson and Middleton by Steven V. Camerino, Esq. on behalf of the City of Claremont; Michael Holmes, Esq. and Kenneth Traum for the Office of Consumer Advocate for residential ratepayers; and, Robert Frank, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

This case began with two filings in November 1997: one by the City of Claremont, New Hampshire (Claremont) and the other by Connecticut Valley Electric Company (CVEC). Claremont's filing consisted of a petition asking the Commission to find CVEC imprudent for failing to terminate its wholesale requirements contract with Central Vermont Public Service Corporation (CVPS).[1] CVEC's filing proposed rate increases in its Fuel Adjustment and Purchased

[1] CVEC is a wholly-owned subsidiary of CVPS. The CVEC-CVPS wholesale contract has been referred to in various previous orders as the "RS-2" rate schedule. See e.g. Order No. 22,912 (April 29, 1999).

Power Adjustment Clauses (FAC and PPCA) of 1.3% and 11.0%, respectively, effective for calendar year 1998. The Commission consolidated Claremont's petition (DC 97-244) with CVEC's filing (DR 97-241) and held a consolidated hearing addressing both matters in December, 1997.

In Order No. 22,815 (December 31, 1997), the Commission found CVEC imprudent for remaining in the CVPS contract when lower cost supply alternatives existed in the wholesale power market. In particular, the Commission found that CVEC had failed to terminate the wholesale power contract between CVEC and CVPS solely in order to benefit CVPS's shareholders, and that "ratepayers of CVEC received little or no consideration in the decision-making process of CVPS." Order No. 22,815 at 10. On this basis, the Commission rejected the proposed rate increases. The Commission also announced additional hearings to determine what CVEC's costs for wholesale power would have been had CVEC been prudent and its costs reflected just and reasonable levels. Order No. 22,815 at 10-11. Pending the outcome of those hearings, the Commission directed CVEC to continue billing its then-current 1997 rates.

In response to Order No. 22,815, on January 12, 1998, CVEC filed a timely motion for rehearing raising essentially four issues. First, CVEC alleged the order was an unlawful attempt to advance what it characterized as the State's restructuring "agenda". Second, it argued that the Commission was preempted by the Federal Power Act from finding CVEC imprudent and disallowing any portion of the costs incurred under the CVPS contract. Third, CVEC alleged that the Commission improperly found CVEC imprudent without making findings of fact and rulings of law. Finally, CVEC stated that it was provided insufficient notice prior to the hearings.

In Order No. 22,838 (January 20, 1998), the Commission

partially granted CVEC's motion for rehearing. The Commission stated that it would afford CVEC another opportunity to present evidence and testimony on the prudence issue as well as on the potential financial consequences of disallowing the recovery of RS-2 costs. Order No. 22,838 at 2-3. However, the Commission specifically rejected CVEC's contention that Order No. 22,815 abandoned traditional ratemaking principles by advancing the restructuring policies of RSA 374-F. *Id.* 2-4.

During January and February 1998, the Commission held evidentiary hearings to address CVEC's rehearing request and the other matters noticed in Order No. 22,815.

On February 23, 1998, the Commission publicly deliberated all outstanding matters relative to CVEC's original filing and Claremont's petition. The Commission affirmed its finding that CVEC was imprudent for failing to terminate the CVPS contract. The Commission also decided that $0.04 kWh was a "conservative estimate" of the rate at which CVEC could have procured its power requirements from other wholesale suppliers for 1998. A final written order was not issued. Thus, pursuant to RSA 363:17-b, a final determination in this case has not been made.

On April 9, 1998, at the request of CVEC and CVPS, the United States District Court for the District of New Hampshire issued a preliminary injunction enjoining the Commission from enforcing Order No. 22,815. The preliminary injunction directed the Commission to allow CVEC to recover through its retail rates all wholesale power costs associated with the CVEC-CVPS requirements contract. In compliance with the District Court's order, the Commission approved revised tariff sheets increasing CVEC's rates by $0.0235 per kWh and forcing the average residential customer of CVEC to pay 22% higher rates. Order No. 22,912 (April 29, 1998). The Commission

directed CVEC to maintain records of the difference between the amounts that CVEC would have collected under its 1997 rates and any amounts that it collects as a result of the District Court's order. *Id.* at 2-3. Finally, the Commission placed CVEC on notice that "it will be liable for refunds, plus interest, in the event that the District Court's Order is overturned." *Id.* at 3. On December 3, 1998, the United States Court of Appeals for the First Circuit vacated the preliminary injunction. *Public Service Company of New Hampshire, et al. v. Patch et al.*, 1998 WL 950685 (1st Cir.). The First Circuit rejected CVEC's preemption argument and affirmed the Commission's authority to evaluate the prudence of CVEC's decision to purchase power from CVPS rather than from alternative sources. *Id.* at 6. After issuing this decision, the First Circuit denied CVEC/CVPS's requests for rehearing and a stay pending an appeal to the United States Supreme Court. Thereafter, the United States Supreme Court denied another request for a stay, and on March 4, 1999, the First Circuit issued an informal mandate pursuant to F.R.A.P. 41(a) relative to its December 1998 decision.

II. DISCUSSION

At the outset, we note that CVEC secured the preliminary injunction before the Commission issued a final order addressing CVEC's rehearing request. Although CVEC's primary argument on rehearing has been resolved by the First Circuit, we intend to address the other matters raised in the Motion for Rehearing in a separate order which we expect to issue in the near future. The ensuing discussion is intended to achieve two objectives: first, to clarify the status of this proceeding; and second, to inform CVEC of its obligations in light of the First Circuit's decision vacating the preliminary injunction.

On several previous occasions, we have explained that our actions in this case are unrelated to the electric

restructuring docket and the implementation of RSA 374-F. *See e.g.*, Order No. 22,838 at 3. Notwithstanding the foregoing, CVEC has continued to allege that we are somehow using this proceeding as a vehicle to implement the State's restructuring policies. We will once again endeavor to be very clear about this matter: The objective of this proceeding is not to promote the restructuring policies of RSA 374-F or to force CVEC to charge "market-based" retail rates. Rather, our objective was and is to set CVEC's rates at just and reasonable levels consistent with our long-standing statutory obligation under RSA 378:7. Thus, as long as CVEC retains its obligation to serve, the Company continues to bear the obligation to exercise prudence in obtaining supply and the Commission must insure that resulting rates are just and reasonable. To do that, we have had to determine whether CVEC acted prudently in electing to remain in the CVPS contract when other lower cost alternatives existed. *See Appeal of Sinclair Machine Products, Inc.*, 126 N.H. 822, 834 (1985) ("The wholesale rate must be justified by the utility as the product of reasonable efforts to secure the lowest cost in light of appropriate alternatives available to the company."). We found that the RS-2 rate did not meet this test, and in fact, that CVEC had remained in the contract solely to benefit CVPS's shareholders.[2] This is precisely the concern that CVEC was advised of in 1986 after the Court issued the *Sinclair* decision, Order No. 18,148, 71 NHPUC 145 (1986).

As a result of the preliminary injunction, CVEC's ratepayers have been forced to shoulder the significant financial burden of paying imprudently-incurred costs. When CVEC obtained the preliminary injunction, we expressly placed CVEC on notice that "it will be liable for refunds, plus interest, in the event that the District Court's Order is

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[2] Specifically, there was substantial evidence presented in DR 97-241 showing that CVEC could have procured lower cost wholesale purchased power to fulfill its service obligations during 1998.

overturned." Order 22,912 at 3.

We note that CVEC and CVPS have jointly filed a petition with the United States Supreme Court seeking a writ of certiorari; that petition is pending. The Supreme Court, however, has denied their request to stay the mandate of the First Circuit.

Accordingly, we direct CVEC to file within (5) business days its calculation of the difference between the total FAC and PPCA revenues collected during 1998 and those FAC and PPCA revenues that it would have collected had the 1997 FAC and PPCA rate levels been in effect for the entire year. We direct CVEC to calculate a rate rider to be applied to all billings for the period April 1, 1999 through December 31, 1999 to refund the over-collection in 1998 relative to the 1997 rate level, and to file a tariff reflecting the terms of this rate rider. We will address in our decision on CVEC's rehearing requests whether any further refunds may result from reconciling the 1998 rates to the level obtainable from prudent purchasing practices, consistent with the deliberations at the Commission's February 23, 1998 public meeting.[3] Workpapers supporting CVEC's calculation of the refund should be filed concurrent with the rate rider tariff pages.

Based upon the foregoing, it is hereby

ORDERED, that Connecticut Valley Electric Company shall comply with the directives set forth herein.

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[3] We note CVEC has alleged in consolidated dockets, DR 98-206 and DC 98-198, that the Commission should not alter CVEC's retail rates until the District Court rules on the Commission's pending motion to dissolve the preliminary injunction. Again, we will address that issue in a separate order.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of March, 1999.

/s/ Douglas L. Patch	/s/ Susan S. Geiger	/s/ Nancy Brockway
Douglas L. Patch	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

/s/ Thomas B. Getz
Thomas B. Getz
Executive Director and Secretary

Central Vermont Public Service Corporation
Rate Schedule
FERC No. 135

First Revised Sheet No. 1
Effective: January 1, 1986

RATE RS-2 FOR RESERVE SYSTEM CAPACITY SERVICE BY CENTRAL VERMONT PUBLIC SERVICE CORPORATION TO CONNECTICUT VALLEY ELECTRIC COMPANY INC.

A. Obligation of The Parties

Connecticut Valley Electric Company Inc. ("the Customer"), by commencing to take reserve system capacity service from Central Vermont Public Service Corporation ("the Company"), agrees to take and pay for, and the Company agrees to furnish the service, subject to the terms and conditions of this rate schedule as it may be in effect from time to time subject to the provisions of Paragraph F hereof and to the action of the regulatory Commission having jurisdiction.

B. Scope of Service

The Company shall provide electricity to meet the Customer's entire electric service requirements with the exception of capacity and/or energy which the Customer may purchase from non-utility sources located within its service area.

C. Effect On Other Agreements

This rate schedule supersedes all previous service agreements and rate schedules between the Company and the Customer for wholesale electric service; provided

that the Company and the Customer shall continue to remain liable to one another for all sums of money due under the terms of any such previous service agreement and rate schedule; and provided further that nothing herein is intended to relieve the Company

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	First Revised Sheet No. 2 Effective: January 1, 1986

or the Customer from any obligations regarding the termination of service under such rate schedule or service agreement.

D. Periods of Service

The initial service year hereunder shall commence on the effective date of this rate schedule and shall terminate on December 31 of that year. Each successive service year shall coincide with the calendar year.

E. Termination

Service under this rate schedule may be terminated at any time if both the Company and the Customer agree to the termination. If there is no agreement, service may be terminated at the end of a service year if the party seeking termination has given written notice of termination prior to the beginning of that service year.

F. **Amendment**

The Company shall have the right at any time to amend this rate schedule by furnishing an appropriate statement of such amendment to the Customer and filing the same with the Federal Energy Regulatory Commission (or such other regulatory agency as may have jurisdiction in the premises).

Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under Section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	First Revised Sheet No. 3 Effective: January 1, 1986

G. **Monthly Charges**

The Customer shall pay the following monthly charges:

(i) a capacity charge for generation and transmission service which shall be computed as one-twelfth of the Customer's portion of the Company's annual capacity cost. The method of determining the annual capacity cost is set forth in Paragraph P.

(ii) a charge of fifteen cents (15¢) per KVAR of excess reactive demand per delivery point. At each delivery point, the KVAR of excess reactive demand shall be

any excess of the greatest sixty minute KVAR measured during the current month over one-half of the greatest sixty minute KW measured during the same period.

(iii) a charge for the Company's cost of owning and maintaining delivery points. The method of determining those monthly charges is as set forth in Paragraph P.

(iv) a charge for transformation of power below 34 KV which shall be computed at 1/12 of an annual rate in $/KW times the Customer's monthly service requirement at each delivery point. The method of determining the annual rate is set forth in Paragraph P. The Customer's service requirement for transformation of power below 34 KV for a month shall be the greater of either (1) the kilowatts metered at each of the Customer's delivery points below 34 KV during the 60-minute period of the customer's greatest energy use at each such delivery point during the month which amounts shall be divided by a loss adjustment factor of .970 or, (2) the largest service requirement determined in accordance with clause (i) for the

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	First Revised Sheet No. 4 Effective: January 1, 1986

preceding months of November, December, January, February and March.

(v) a customer charge consisting of a direct assignment of regulatory commission expense, which may be identified as pertaining to the Customer within the service year.

(vi) an energy charge for each KWH, which shall be divided by a loss adjustment factor of .965 for deliveries at 34 KV or higher and of .935 for deliveries at 12.5 KV or less, sold during that month shall be computed in accordance with the following formula: Unit Cost ($/KWH) = (I + J – M) + (K + L – N).

In the said formula for the current month:

I($) = The energy cost portion of the cost of Purchased Power included in FERC Account 555, excluding costs associated with the cost of power generated by the St. Lawrence and Niagara projects.

J($) = The cost of fuel consumed by Company-owned and/or operated generating equipment as defined in FERC Account Nos. 501, 518, and 547.

M($) = Revenues received from sales to NEPEX plus the cost of energy used to supply any of the Company's unit sales and short-term system capacity and energy sales.

Central Vermont Public Service Corporation	First Revised Sheet No. 5
Rate Schedule FERC No. 135	Effective: January 1, 1986

K(KWH)= Total KWH of energy purchased outside of the Company's system during the current month as delivered to the Company's transmission system. Such KWH's shall be those associated with Purchased Power Account No. 555 excluding KWH's associated with the purchase of power generated by the St. Lawrence and Niagara projects.

L(KWH)= Net KWH produced by Company-owned generation.

N(KWH)= KWH sold by the Company as unit sales, as short-term system capacity and energy sales, and as sales to NEPEX.

H. Delivery Of Power

The Company shall be responsible for delivering or arranging the delivery of the electricity sold hereunder to the Customer at the delivery points hereinafter identified:

Points of Delivery	Voltage
Bath	under 12.5 KV
Cornish	12.5 KV
Coy	46 KV
Haverhill	12.5 KV
Joy	46 KV
Lafayette Street	46 KV
Lyme	12.5 KV
Maple Avenue	46 KV
Orford	under 12.5 KV
Piermont	12.5 KV
Temple Eastex	46 KV
Sullivan	46 KV

I. Rights Of Way

The obligations of the Company and the Customer are subject to and conditioned upon securing and retaining all rights-of-way, franchises, locations, permits and other rights and approvals necessary in order to permit

service hereunder, and each party agrees to use its best efforts to secure and retain all such rights-of-way, franchises and other rights and approvals.

J. Continuity Of Service

The Company shall not be responsible for any failure to supply electric service, nor for interruption, reversal or abnormal voltage of the supply, if such failure, interruption, reversal or abnormal voltage is without willful default or gross negligence on its part. Whenever the integrity of the Company's system or the supply of electricity is threatened by conditions on its system or on the systems with which it is directly or indirectly interconnected, or whenever it is necessary or desirable to aid in the restoration of service, the Company may, in its sole judgment, curtail or interrupt electric service or reduce voltage to the Customer and such curtailment, interruption or reduction shall not constitute willful default by the Company. When the Company interrupts or varies electric service to make repairs to or changes in its facilities, such action shall be taken upon reasonable notice to the Customer, or without notice in an emergency when such notification would be impracticable or would prolong a dangerous situation.

K. Metering

Metering equipment utilized at delivery points for billing of all sales of capacity and energy made by the Company shall be supplied, installed, wired, owned and maintained, calibrated and scaled by the Company. Such meters shall be of a type selected by the Company.

When metering is at a point other than the delivery point, the metering equipment shall be compensated to register values which would have been recorded if the equipment had been located at the delivery point.

The accuracy of the metering equipment shall be verified by proper test at any time upon reasonable notice given by either of the parties to the other, and each party shall be entitled to have a representative present at such verification.

The work of testing and adjusting any meter for accuracy shall be performed by and at the expense of the Company, provided that such test is not called for by the other party more often than once in twelve months. If either party shall require more than one verification of any meter in any twelve-month period, and the meter proves to be accurate within two (2) percent up or down, the additional verification shall be at the expense of the party requesting it.

If such equipment is found to be inaccurate by more than two (2) percent up or down, the equipment shall be made accurate and the meter readings for the period of inaccuracy shall be adjusted to correct such inaccuracies as far as the same can be reasonably ascertained, but no adjustment prior to the beginning

of the second preceding month shall be made except by agreement of the parties.

In the event that the Company's meters fail to register properly during any billing period, the demand and energy quantities will be estimated by the Company from the best available data.

If requested, the Customer agrees to supply, free of cost, at each point of delivery to its system a suitable location for the installation of the Company's metering equipment. Such location shall be by agreement between the Company and the Customer. The Customer shall maintain electric isolation of its system served from each point of delivery.

L. Use Of Service

The Customer shall exercise diligence to use the electric service furnished under this tariff with a view to securing efficiency of the Company's apparatus and system in keeping with generally accepted good operating standards, will maintain a power factor as near 90 percent lagging as practicable consistent with good engineering practice, will construct its distribution lines in accordance with specifications at least equal to those prescribed by the National Electrical Safety Code of the United States Bureau of Standards, will maintain its lines at all times in a safe operating condition, will operate lines in such

manner as not to interfere with the service of the Company to its customers, will coordinate with the Company maintenance which may adversely affect the operation of the Company's facilities, and will use electric service equally from the three phases as nearly as possible. If the Customer shall deem it necessary that voltage regulating equipment, including

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Third Revised Sheet No. 9 Effective: January 1, 1986

but not limited to the structures and devices associated with such equipment, is required at any delivery point, such equipment shall be provided, owned and maintained by the Customer.

M. Liability

The Customer assumes all responsibility for electricity beyond the point of delivery and the Company shall not be liable for damages to the person or property of the customer or its employees or any other persons resulting from the use or presence of electricity beyond the point of delivery, except where damage shall have been occasioned by the negligence of the Company, its agents, or employees.

N. Access

The Customer gives all necessary permission to enable the agents of the Company to carry out the terms

of this tariff and construct and maintain its lines and circuits in and at all places required by the Company and owned, leased or controlled by the Customer. The Customer gives to the Company the right for its duly authorized agents and employees to enter the premises of the Customer at all reasonable times for the purpose of reading meters, keeping in repair or removing its property or inspecting its work incident to rendering service under this tariff.

O. **Billings and Payment**

1. All meters shall be read and bills rendered monthly. If the Company is unable to obtain the reading of a meter, it may estimate the reading.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Third Revised Sheet No. 10 Effective: January 1, 1989

2. All bills shall be due and payable upon presentation. In the event of a dispute as to the amount of any bill, the Customer will notify the Company of the amount in dispute and the Customer will pay to the Company the total bill including the disputed amount. The Company shall refund, with simple interest at the rate described in Paragraph 0-3, any portion of the disputed amount ultimately found to be improper.

3. When all or part of any bill shall remain unpaid for more than thirty (30) days from the date of the Company's bill, which shall be the date of mailing, interest at the then prime rate offered by The First National Bank of

Boston, its successors or assigns, during the period of such non-payment shall accrue to the Company from and after the thirtieth (30th) day from the date of said bill and be payable to the Company.

4. In the event adequate billing data are not available bills may be rendered on an estimated basis subject to prompt corrective adjustment when such data are received.

5. The Customer shall not have the right to challenge any bill, invoice or statement, nor bring any court or administrative action of any kind questioning the accuracy of the same after a period of twelve (12) months from the date it is rendered. In the case of a bill, invoice or statement containing estimates, the Customer shall not have the right to challenge its accuracy after a period of 12 months from the date it is adjusted to reflect the actual amounts due. The Customer's rights hereunder relate to the mathematical accuracy of the billing computation provided to the Customer with its bill and do not relate to the compliance of the rates and, charges with the rate schedule or to the justness and reasonableness of the cost of service data, which subjects are covered by Paragraph Q(4).

P. **Capacity Charge Formula**

1. The service year Capacity Charge for generation and transmission service shall be computed in accordance with the following formula:

Cost ($/Year) = [(A) (C + D + E + H) + (G) (F)].

In the said formula for the service year:

A =A(cc) + A(c). A(cc) = Company capacity for the Customer's reserve-required load, which is the difference between total Customer capacity and capacity specifically assignable to the Customer. Total Customer capacity is obtained by multiplying the sum of (1) the Company's capacity for reserve-required load and (2) capacity specifically assignable to the Customer by B which is the 70/30 coincident reserve-required load allocation. A(c) = total net Company capacity, which is the sum of the Company's purchased capacity entitlements, plus owned-generation capacity, minus unit sales of owned-generation capacity, minus short-term sales of system capacity, minus capacity associated with power generated by the St. Lawrence and Niagara projects.

$$B = \frac{[.70\ (A(p)) + .30\ (A(a))].}{[.70\ (B(p)) + .30\ (B(a))].}$$

A(p) = the Customer's load on the Company's system at the time of the Company's annual transmission peak, G(p), divided by loss adjustment factors of .965 and .935 for deliveries at 34 KV or higher and at 12.5 KV

Central Vermont Public Service Corporation	First Revised Sheet No. 12
Rate Schedule FERC No. 135	Effective: January 1, 1986

or lower, respectively. A(a) = the average of the 12 monthly equivalents of A(p). B(p) = the Company's reserve-required load at the time of the Company's annual transmission peak. B(a) = the average of the 12 monthly equivalents of B(p).

C($) =The actual fixed charge portion of the cost of Purchased Power as defined in FERC Account No. 555, excluding such costs associated with the cost of power generated by the St. Lawrence and Niagara projects, and excluding the difference between the revenues from short-term system capacity and energy sales and the cost of energy used to supply such sales.

D($) =Transmission by Others as defined in FERC Account No. 565.

E($) =The fixed charges relating to the cost of Company-owned generation, less the difference between the revenues from unit sales and the cost of energy used to supply unit sales, and less revenues from other interruptible sales.

F($) =The fixed charges relating to the cost of Company-owned transmission, excluding Highgate transmission.

G =A(p) + G(p). G(p) = the maximum annual peak load on the Company's transmission system.

H($) =The fixed charges relating to the cost of Company-owned Highgate transmission.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Second Revised Sheet No. 13 Effective: January 1, 1986

2. For billing during the service year, the Company will employ estimated values for A through H. Following the conclusion of the Service Year, the Company shall recalculate the Annual Capacity Charge by substituting actual data for A through H. By May 31st following the end of the Service Year, the Company shall credit to the Customer the excess, if any, of revenue collections that were made pursuant to the aforesaid estimated values over the collections that would have been made pursuant to actual values, and the Company shall bill and the Customer shall pay the excess, if any, of the revenue collections that would have been made pursuant to the actual values for A through H over the collections that were made pursuant to the estimates for those values. Any credit for the excess of revenue collections shall be increased by interest which is to be computed and accrued in accordance with the Commission's regulations governing refunds by electric utilities to their customers.

3. In Paragraph P-1, the value for E shall be determined in accordance with the following formula: E = (Investment Base x Rate of Return) + Income Tax Allowance + Expenses.

(i) The investment base for the service year shall be derived from per book production data for the service year, except where per book data should be adjusted in order that an amount of capitalized AFDC be included relative to the amount of construction work in

progress included in the investment base in prior service years. It shall consist of the sum of:

(a) Per-book average gross production plant; plus

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Second Revised Sheet No. 14 Effective: January 1, 1989

(b) Average general and intangible plant functionalized to production plant based on labor expense; plus

(c) An allowance for materials and supplies applicable to production plant; plus

(d) An allowance for cash working capital based on one-eighth of production operation and maintenance expense exclusive of fuel and purchased power expenses, one-fourteenth of purchased power and transmission by others expenses, and one-sixth of fuel expense; less

(e) The per-book average depreciation reserve for production plant and a portion of the average depreciation reserve for general plant allocated to the production functions on the basis of labor expense; less

(f) Average deferred income tax balances properly allocable to the plant included in (a) and (b) above consistent with FERC policy applicable to the service year functionalized on net plant ratios and labor

expense, respectively, except where specific functional assignment is appropriate; plus or less

(g) other average production related amounts which are recorded on the Company's books and related to the service hereunder, and which are to be added to or subtracted from

investment base consistent with FERC policy applicable to the service year.

As used in this clause (i), "average" is the average of the beginning and year-end balances unless a facility on which the Company has accrued AFDC enters service after the beginning of the service year in which case the (a) investment and the (e) and (g) related balances associated with such facility shall be based on an average of monthly balances.

(ii) The rate of return shall be determined on the basis of the following formula:

Cost of Capital = (DR x DI) + (PR x PD) + (CR x CE).

Where:

DR =Debt to total capitalization percentage which shall be the Company's debt to total capitalization. Debt includes first mortgage bonds and other long term debt less unamortized debt expense on the Company's books.

DI =Weighted average effective interest rate on all Company debt securities included in DR above.

PR =Preferred securities to total capitalization percentage which shall be deemed to be the Company's preferred to total capitalization.

PD =Weighted average effective dividend rate (cost to the Company at net proceeds) on all Company preferred securities included in PR above.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Fourth Revised Sheet No. 16 Effective: January 1, 1993

CR =Common to total capitalization percentage which shall be the Company's common equity to total capitalization.

CE =Return on common equity. Which shall be 11.5% for the 1992 service year and 10.9% for subsequent service years.

DR + PR + CR shall equal one hundred (100) percent. Each of the above determinations shall be based on the Company's per book capitalization at the end of the service year.

(iii) The income tax allowance will be calculated using the rate of return developed in accordance with Subparagraph P-3 (ii), the Company's service year per book income tax deductions and adjustments allocable to production facilities, the effective tax rates under Federal and state income tax statutes for the service year,

and credits including amortization of the investment tax credit allocable to production facilities. At no time shall the income tax allowance be deemed to be less than zero. The long-term debt interest expense tax deduction used in the calculation of taxable net income shall be determined by multiplying the weighted cost of debt employed in the rate of return calculation by the investment base.

(iv) Expenses shall consist of production related per book depreciation expense, operation and maintenance expense including administrative and general expense, and taxes other than income taxes for the service year; provided that the administrative and general expense shall exclude regulatory commission expense, the appropriate portion of which shall be charged to the Customer pursuant to Subparagraph G(v). Per book depreciation expense

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	First Revised Sheet No. 17 Effective: January 1, 1989

shall be adjusted in order to reflect any adjustment in investment base listed in Subparagraph 3(i) hereof. Administrative and general expense shall be allocated to the production function on the basis of labor expense. Plant related and labor related taxes other than income taxes shall be functionally assigned on the basis of net plant ratios and labor expense, respectively. The amortization of property losses resulting from the Company's sale of Seabrook I shall be $3,857,507 on an annual basis for twenty (20) years beginning June 1, 1987 and ending

May 31, 2007. Service year expenses shall also include such other production related amounts as are reported on the Company's books and which should be included in cost of service consistent with FERC policy applicable to the service year. The production expenses to be charged hereunder shall be those related to the service provided hereunder.

4. In Paragraph P-1, the value of F shall be determined in accordance with the following formula: F = (Investment Base x Rate of Return) + Income Tax Allowance + Expenses.

(i) The investment base for the service year shall be derived from per book transmission data, excluding per book Highgate transmission data, for the service year. It shall consist of the sum of the same items listed in subparagraph 3(i) except that the items shall be transmission related rather than production related.

(ii) The rate of return shall be determined on the basis of the formula set forth in subparagraph 3(ii).

(iii) The income tax allowance and expenses shall be calculated in accordance with subparagraphs 3(iii) and 3(iv), respectively, except that the items shall be transmission related.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Original Sheet No. 18 Effective: January 1, 1986

5. In Paragraph P-1, the value of H shall be determined in accordance with the following formula: H =

(Investment Base x Rate of Return) + Income Tax Allowance + Expenses.

(i) The investment base for the service year shall be derived from per book Highgate transmission data for the service year. It shall consist of the sum of the same items listed in subparagraph 3(i) except that the items shall be Highgate transmission related rather than production related.

(ii) The rate of return shall be determined on the basis of the formula set forth in subparagraph 3(ii).

(iii) The income tax allowance and expenses shall be calculated in accordance with subparagraphs 3(iii) and 3(iv), respectively, except that the items shall be Highgate transmission related.

6. Delivery point and transformation costs to 12.5 KV or less described in Subparagraphs G(iii) and G(iv) shall be developed on a basis which is consistent with the development of production and transmission costs as set forth in Paragraph P-3.

Q. Annual Reports Of Estimated And Actual Costs

1. On or before May 31st of each year, the Company will file with the Federal Energy Regulatory Commission a report showing the actual values for A through H and the development of the actual charges for the immediately preceding service year. The said report shall also indicate the difference between revenue collections for that service year on the estimated and actual bases.

Central Vermont Public Service Corporation	First Revised Sheet No. 19
Rate Schedule FERC No. 135	Effective: January 1, 1989

2. By December lst of each year, the Company will file with the Federal Energy Regulatory Commission a report showing the basis for estimated billing during the service year commencing on January 1. The Company may revise the said report by submitting changed data by December 15th of that year.

3. The Company will also submit such other information and data regarding the service and charges to the Customer as the Commission, or its Staff, may request on the review of the aforementioned reports. If at any time during the service year the Company concludes that the estimated charges are too high or too low, the Company may submit to the Commission a revised report for estimated billing to commence thirty days after the said submission and to apply for the balance of the service year.

4. The Commission may upon complaint of any interested party or upon its own motion initiate an investigation into whether the Company's rates and charges under the rate schedule are or have been just, reasonable and not unduly discriminatory and may in its final order:

(i) Change any provision of the rate schedule found to provide for unjust, unreasonable, or unduly discriminatory rates and charges under Section 206 of the Federal Power Act and order refunds with interest of amounts collected for service since the refund effective

date established under Section 206 in excess of the amounts that would have been collected under the provision as revised by the Commission;

(ii) Order adjustments, up or down, so that rates and charges are in compliance with the rate schedule; provided however, that refunds may not be required for periods earlier

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	First Revised Sheet No. 20 Effective: January 1, 1989

than five (5) years prior to the date of the Commission's order instituting the investigation.

If refunds are required under this paragraph, the Company will make them within thirty days of the Commission's order with interest at a rate to be determined in accordance with the provision(s) of the Commission's regulations under the Federal Power Act in effect at the time refunds are ordered. If upward adjustments are required pursuant to this paragraph, the Company will reflect such adjustments in the next rate submittal.

The Commission's authority under Paragraph Q(4)(ii) supersedes any limitations, express or implied, on such authority contained in any other section of the rate schedule.

R. Refunds To The Company

The Company shall credit to the Customer's billings hereunder the Customer's share of any refunds which the Company received from other utilities and which have been reflected in payments made by the Customer to the Company.

S. Supravening Laws and Regulations

The obligations of the Company and the Customer hereunder are subject to any present and future Federal and State laws, regulations, orders or other requirements duly promulgated.

Central Vermont Public Service Corporation	First Revised Sheet No. 21
Rate Schedule FERC No. 135	Effective: January 1, 1989

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SUPPLEMENT NO. 1 TO RATE SCHEDULE FERC NO. 135 (RS-2 RATE SCHEDULE) BETWEEN CENTRAL VERMONT PUBLIC SERVICE CORPORATION AND CONNECTICUT VALLEY ELECTRIC COMPANY INC.

WHEREAS Central Vermont Public Service Corporation ("Central Vermont") has supplied wholesale power requirements service to Connecticut Valley Electric Company Inc. ("Connecticut Valley") under Central Vermont's Rate Schedule FERC No. 135 ("RS-2 Rate Schedule") and predecessor rate schedules and tariffs; and

WHEREAS it is anticipated that Connecticut Valley will in the foreseeable future cease taking wholesale requirements service from Central Vermont, at which time Connecticut Valley will become, in whole or in part, an unbundled wholesale transmission services customer of Central Vermont; and

WHEREAS upon termination of Connecticut Valley's relationship as a wholesale power requirements customer of Central Vermont, Central Vermont will incur wholesale stranded costs as defined by the Federal Energy Regulatory Commission ("FERC") in 18 CFR § 36.26; and

WHEREAS Central Vermont's RS-2 wholesale stranded costs are calculated in Exhibit 1 hereto; and

WHEREAS the FERC by order issued December 18, 1997, in Docket No. ER97-3435-000, authorized Central Vermont to file an amendment to the RS-2 Rate Schedule to add an Exit Fee to recover its wholesale stranded costs;

NOW THEREFORE, the RS-2 Rate Schedule is hereby supplemented to include the following provisions:

1. *Effective Date.* This Supplement No. 1 to the RS-2 Rate Schedule shall become effective as of March 13, 1998, subject to acceptance for filing by the FERC.

2. *Exit Fee.* As of the date upon which wholesale requirements service to Connecticut Valley under the RS-2 Rate Schedule terminates, Connecticut Valley shall be obligated to pay Central Vermont an Exit Fee in the amount of $44,925,335* which is Central Vermont's wholesale stranded cost as calculated under the methodology set forth in FERC's Regulations at 18 C.F.R. § 35.26(c)(2) and expressed on a net present value basis as of December 31, 1997. This obligation and the payment terms of this Supplement No. 1 shall survive termination of the RS-2 Rate Schedule.

3. *Amortization.* At its option, Connecticut Valley may choose to amortize payment of the Exit Fee over a ten (10)-year period. In such case, Connecticut Valley shall make one hundred and twenty (120) monthly payments of $557,010 to cover the principal amounts due plus interest on the unamortized balances.

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* The RS-2 Rate Schedule includes an annual cost of service true-up mechanism which could affect the revenue stream estimate underlying the $44,925,335 and $557,010 figures set forth in paragraphs 2 and 3 of this Supplement No. 1. Therefore, notwithstanding the provisions of those paragraphs, the $44,925,335 and $557,010 figures will be recalculated, and revised if necessary, as of May 31, 1998 using the same methodologies shown on Appendix A hereto and using actual calendar year 1997 data for the variable referred to by the FERC as the "Revenue Stream Estimate" or "RSE." Central Vermont will notify Connecticut Valley promptly in writing of any such revision, but need not file the revision with the FERC inasmuch as this Supplement No. 1 already authorizes the revision.

4. *Payment Terms.* Central Vermont shall bill Connecticut Valley for the Exit Fee within thirty (30) days after the Exit Fee obligation accrues. Connecticut Valley shall pay the full amount of the Exit Fee within twenty (20) days thereafter or shall indicate in writing within said twenty (20)-day period that it intends to amortize the payments over ten (10) years. If Connecticut Valley elects to amortize payment of the Exit Fee, it shall include the first month's payment with its response and shall make subsequent payments on or before the twentieth (20th) day of each succeeding month.

EXHIBIT 1 TO SUPPLEMENT NO. 1 TO RATE SCHEDULE FERC NO. 135 (RS-2 RATE SCHEDULE)

A. Determination of Stranded Cost Obligation ("SCO")

RS-2 Revenues	$10,593,558
Transmission Revenues	550,938
Revenue Stream Estimate ("RSE")	$10,042,620
RS-2 Variable Costs	2,540,068
Net	$ 7,502,552

Formula: SCO = (RSE - CMVE) x L

SCO = ($10,042,620 - $5,273,414) x 19 years

SCO = $4,769,206 x 19 years

SCO = $90,614,914

The Net Present Value ("NPV") of SCO using a discount rate of 8.27% is: $44,925,335

B. Determination of Amortized Monthly Exit Fee

To collect $44,925,335 plus interest over 10 years, a monthly collection of $557,010 is required using the current prime rate of 8.50%, compounded monthly.

DR 97-241

CONNECTICUT VALLEY ELECTRIC COMPANY

Fuel Adjustment Clause and Purchased Power Cost Adjustment

Order Setting FAC and PPCA Rates Temporarily at Existing Rates, Approving Proposed QF Rates, Finding Imprudence For Not Terminating Power Purchase Contract and Setting Date for Hearing on Appropriate Level of Power Costs to Include in Rates

ORDER NO. 22,815

December 31, 1997

APPEARANCES: Kenneth Picton, Esq. for Connecticut Valley Electric Company; Ransmeier and Spellman by Dom S. D'Ambruoso, Esq. and John T. Alexander, Esq. on behalf of Connecticut Valley Electric Company; McLane, Graf, Raulerson and Middleton by Steven V. Camerino, Esq. on behalf of the City of Claremont; Kenneth Traum for the Office of Consumer Advocate for residential ratepayers; and, Robert Frank, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On November 26, 1997, Connecticut Valley Electric Company, Inc. (CVEC or the Company), filed with the New Hampshire Public Utilities Commission (Commission) its proposed Fuel Adjustment Clause (FAC), Purchased Power Cost Adjustment (PPCA) and Short-Term Energy Purchase Rate. The filing included proposed tariff pages to be effective for bills rendered on or after January 1, 1998: 15th Revised Page 17, 12th Revised Page 18, 10th Revised Page 50, and 7th Revised Page 51.

In addition, the Company's proposal includes revised Pilot tariffs due to changes in the costs upon which the FAC and PPCA charges are based so that Pilot customers are neither advantaged nor disadvantaged with respect to regular bundled tariff customers. Revised Pilot tariff pages are: 4th revised Page 53, 54 and 55; 3rd revised Page 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66. The Office of Consumer Advocate (OCA) is a statutorily authorized intervenor.

On November 17, 1997, the City of Claremont filed a complaint against CVEC and a petition for a reduction of electric rates. On December 10, 1997, the Commission consolidated the complaint proceeding, which had been initially docketed as DC 97-244, with the FAC and PPCA proceeding.

At the hearing, the Commission heard arguments concerning the scope of the proceeding, based on a Motion to Dismiss by CVEC, which the Commission denied. Four Central Vermont Public Service (CVPS) witnesses testified on behalf of CVEC: Peter Damien Lena, Ph.D., Principal Consultant – Forecasting; Charles A. Watts, Senior Marketing Analyst; C.J. Frankiewicz, Financial Analysis Coordinator; and, Scott R. Anderson, Regulatory Compliance Facilitator.

After the hearing, CVEC filed a record request which adjusted its proposed FAC and PPCA rates due to a revised 1998 sales forecast. On December 24, 1998, the Company, based upon a request of Staff, submitted a letter to the Commission which described how CVPS intends to respond to a December 17, 1997 decision by the Federal Energy Regulatory Commission (FERC) in docket

ER97-3435 concerning CVPS's request at the FERC for stranded costs based on the Commission's February 28, 1997 restructuring order for CVEC.

II. POSITIONS OF THE PARTIES AND STAFF

A. CVEC

CVEC proposes to increase its currently effective FAC rate from $0.0059 per kWh to $0.0072 per kWh and to increase its PPCA rate from its Interim PPCA rate of $0.0023 per kWh to $0.0133 per kWh effective on all bills rendered on or after January 1, 1998. The increase in the FAC rate would result in an annual increase in overall revenues to CVEC of $219,554 or 1.3%. The PPCA increase would result in an increase to CVEC's revenues of 11.0% or $1,857,768 on an annual basis.

CVEC's 1998 FAC rate is based on forecasted 1998 RS-2 of $2,987,348 and SPP energy costs of $4,202,800. Adjustments for interest, franchise tax and the over collection from 1997 result in a net estimated energy cost for 1998 of $7,097,667. Base energy revenues of $5,876,961 are subtracted from the $7,097,667 forecasted net energy costs to reflect the energy costs, $1,220,706, to be recovered through the FAC. Those costs are then divided by the forecasted retail sales of 168,888,000 kWh to derive a FAC rate of $0.0072 per kWh for all bills rendered in 1998. CVEC points out that the FAC sales and revenues are neutralized for the New Hampshire Retail Pilot program.

The increase in the FAC rate for 1998 is due to higher RS-2 energy charges which CVEC purchases from its parent company, CVPS, and from lower expected retail

sales and higher costs from the New Hampshire/Vermont Solid Waste Project, a QF located in Claremont, New Hampshire which sells all of its output to CVEC at Commission approved long-term avoided cost rates. The higher projected FAC costs for 1998 are offset by $154,953, the over collection in the FAC expected at the end of 1997 which are $144,741 greater than was forecasted in the 1997 FAC filing. The effect of the proposed FAC rate increase would be to increase a residential customer's monthly bill by $0.66, assuming 500 kWh of electricity usage.

The PPCA increase is calculated by adding the estimated 1998 RS-2 costs and the SPP capacity costs, $9,024,008 and $36,300, respectively, removing the effects of the New Hampshire Pilot program, adding interest and franchise tax to arrive at a total 1998 PPCA cost of $9,114,185. The 1997 PPCA under-collection of $275,285 is added for a net total of $9,389,470. Base capacity revenues of $7,248,765 are then subtracted to yield the 1998 estimated PPCA costs of $2,239,812 which is divided by estimated 1998 retail sales of 168,888,000 to derive the PPCA rate of $0.0133 per kWh.

The PPCA increase reflects an expected under-collection of 1997 PPCA costs of $275,285 due to increased purchased capacity costs of CVPS which are passed on to CVEC, increased production costs of CVPS-owned generation, slig[illegible] increased transmission costs and the reflection that the actual 1996 PPCA over collection was $166,878 less than forecasted.

The under-collection is added to the PPCA costs CVEC expects to incur in 1998. Those costs include an

increase in the RS-2 capacity costs of $281,273. The increased costs are caused by higher net purchased capacity costs of $147,000, higher production capacity and transmission allocation factors result in a $66,000 increase for CVEC, increased costs for CVPS-owned production results in a $36,000 increase for CVEC and transmission related costs result in approximately $57,000 of increased PPCA costs. The Company points out that most of the increase in the PPCA is due to lower revenues in 1997 as a result of refunds for over-collections and that only 4% of the 11% increase is a result of cost increases.

In a letter dated December 23, 1997, CVEC revised its sales forecast for 1998 upward by 1.7% or 2,881,000 kWh. The revised sales forecast results in a slight decrease to the FAC and PPCA rates originally proposed on November 25, 1997. The FAC would decrease to $0.0071 per kWh, a $0.0001 per kWh change, and the PPCA would drop by $0.0003 per kWh to $0.0130 per kWh.

Concerning CVEC's purchases from its parent company, CVPS, under FERC approved wholesale rates, CVEC argues that this proceeding should not address the issues related to CVEC's FAC and PPCA rates that were raised in the City of Claremont's *Petition for a Reduction in Electric Rates*. CVEC believes the issues belong in DR 96-150, the generic docket on New Hampshire electric restructuring To address them in this proceeding would be needlessly duplicative in CVEC's opinion. CVEC also believes the City of Claremont's Petition is premature in that the Commission's directive to terminate the RS-2 contract is subject to a pending motion for rehearing and is therefore not yet final. During the hearing, CVEC stated that if market-based rates were the only costs

allowed to be recovered by CVEC and CVPS continued to bill and receive payment from CVEC under the RS-2 contract, CVEC would not recover approximately $5-$6 million of RS-2 costs and would be in default of its financing agreements.

By letter dated December 19, 1997, CVEC outlined a number of financial and accounting implications if the Commission were to order CVEC to exercise its termination provision of the RS-2 power contract and impose market based ratemaking. CVEC continues to believe that DR 96-150 is the proper docket to address these issues and requests that the Commission fully consider the financial and accounting effects of its decision on CVEC before rendering a decision. CVEC also seeks to meet with Staff and other interested parties to discuss the effects of terminating the RS-2 contract.

B. The City of Claremont

Claremont's complaint against CVEC argues, among other things, that CVEC's rates are unreasonable inasmuch as CVEC should have terminated its wholesale power contract with its parent, CVPS. In support of its complaint, Claremont noted that in Docket DR 96-392, a CVEC Fuel and Purchased Power Adjustment Charge proceeding, the Commission addressed a number of wholesale power related issues raised by the Office of Consumer Advocate and the Commission Staff. Among the issues addressed in that proceeding was whether CVEC, a wholly owned subsidiary of CVPS, had satisfied, in accordance with Commission Order No. 22,469, "its obligation to assess the prospective benefits and costs of

giving termination notice to CVPS for wholesale service." Claremont contends that the Commission found that CVEC had not satisfied this obligation and that CVEC had an obligation to continually assess how best to bring electric service to its customers at the lowest cost. Claremont further contends that, although the Commission recognized that CVEC had not assessed the opportunity for lowering its costs and retail prices by giving termination notice to CVPS, it found that such wholesale power purchase obligations could be better addressed in DR 96-150, the generic docket on electric industry restructuring. Claremont states that the Commission made a finding in DR 96-150, Order No. 22,509 dated February 28, 1997, that CVEC should have terminated its wholesale power purchase contract with CVPS when RSA 374-F was passed on May 21, 1996 and that its failure to do so was imprudent. Under the wholesale power purchase contract with CVPS, CVEC may terminate service at the end of a service year, provided it has given written notice of termination prior to the beginning of that service year. In Claremont's opinion, if CVEC had given written notice of termination to CVPS when RSA 374-F was passed, its obligations to purchase power for CVPS would end effective January 1, 1998.

At the hearing on December 17, 1997, Claremont noted that New Hampshire Electric Cooperative, Inc. (NHEC) provided termination notice to CVPS in March 1994 and exercised its 1-year right to terminate its wholesale purchased power contract with CVPS. One year later, CVPS won the bid to provide power to NHEC at a considerably lower cost. Claremont also stated that NHEC

did not incur stranded cost charges as a result of exercising its right to terminate the wholesale purchased power contract. Claremont provided evidence at the hearing that it believes supports its contention that the cost of power purchased from CVPS is above the wholesale market value for power. For support, Claremont compared CVPS's RS-2 rate of roughly $84 per MWH with 1998 estimated market prices for power as provided in DR 96-150 by PSNH of roughly $38 per MWH and the La Capra estimate for 1998 of roughly $41 per MWH. Under questioning at the hearing, Mr. Watts admitted that $50 per MWH would be a reasonable wholesale market price for electricity.

Claremont believes that, based on the above, it would be unlawful to allow CVEC to continue to recover such imprudently incurred above-market costs from its ratepayers after December 31, 1997. For support, Claremont cites RSA 378:7 and RSA 378:28. Claremont also believes that the Commission has the necessary authority to disallow recovery of above market costs arising from a wholesale power purchase contract, even though the contract itself may be subject to regulation by the Federal Energy Regulatory Commission.

Claremont requests that the Commission schedule a hearing pursuant to RSA 378:7 and rule that: CVEC's current rates are unjust and unreasonable; the cost of power purchased by CVEC from CVPS is above the wholesale market value for that power; and, CVEC is not entitled to recover from its ratepayers the above-market cost of power it purchases from CVPS after December 31, 1997.

C. Office of Consumer Advocate

The OCA supported the City of Claremont's proposal to either reduce the level of payment from CVEC to CVPS, thereby affecting shareholders of CVPS or to allow CVEC to place into rates a lower rate than the RS-2 rate, but higher than market-based rates in order to avoid a CVEC bankruptcy.

D. Staff

Staff did not file testimony, but questioned CVEC on the sales forecast, the treatment of Pilot program costs in the FAC and PPCA rates and the costs included in the RS-2 contract. Staff also questioned CVEC concerning the CVPS conditional notice to terminate the RS-2 contract filed at the FERC and its related request to obtain stranded cost recovery.

III. COMMISSION ANALYSIS

We have reviewed the testimony, transcripts and exhibits in this proceeding, including the post-hearing submittals by CVEC and the City of Claremont. Based on our review of the record, we find CVEC has acted imprudently by not terminating the RS-2 wholesale contract between CVEC and its parent company, CVPS. We make this finding separate from any determination in the electric utility restructuring docket, DR 96-150. The issues before us relate to one of the fundamental principles of regulation, the provision of safe and reliable service at just and reasonable rates. Based on the record, and in disregard for the concerns we have raised previously on

this issue, *See*, Order No. 22,509 (February 28, 1997) 71 NHPUC 145, 148 (1986), it is clear that the contractual relationship between the parent company and the affiliate was continued for the benefit of the shareholders of CVPS and that the ratepayers of CVEC received little to no consideration in the decision-making process of CVPS. Services are provided to CVEC through a service contract with CVPS. CVEC's witness, Mr. Frankiewicz, testified that the analysis done on the termination of the RS-2 contract was done strictly from the perspective of the consolidated company. It would appear that termination was not contemplated, even in light of NHEC's 1994 termination notice of its power contract with CVPS, due to the conflict of interest we noted as far back as 1986.

We will direct CVEC to bill its existing FAC and PPCA rates to customers pending the outcome of a hearing on the rates that would have resulted from an appropriate market-based wholesale rate which would have been available no later than January 1, 1998 if CVEC had acted prudently in its purchased power decisions. Based on CVEC's oral testimony and the letter of December 19, 1997, in which it raised a number of serious financial and accounting implications associated with the termination of the RS-2 contract or the non-recovery of above market power costs, we believe CVEC and the other parties and Staff should be afforded the opportunity to present evidence concerning those implications. Prior to the hearing, we believe that CVEC's request to meet with the parties and Staff to discuss these matters should be granted. We urge CVEC, the City of Claremont, OCA and Staff to meet at the earliest possible date to explore these issues before the hearing.

Based upon the foregoing, it is hereby

ORDERED, that CVEC is directed to bill its current FAC and PPCA rates effective January 1, 1998, on a temporary basis pending a hearing to determine: 1) the appropriate proxy for a market price that CVEC could have obtained if it had terminated its RS-2 wholesale contract with CVPS; 2) the implications of only allowing CVEC to pass on to customers that market price; and, 3) whether the Commission's final determination on the FAC and PPCA rates should be reconciled back to January 1, 1998 or some other date; and it is

FURTHER ORDERED, that tariff pages 10th Revised Page 50 and 7th Revised Page 51, the rates paid to Qualifying Facilities under Rate E, are APPROVED and that all other proposed tariff pages are SUSPENDED pending the outcome of the hearing on the above mentioned issues; and it is

FURTHER ORDERED, that CVEC's Motion to Dismiss is DENIED; and it is

FURTHER ORDERED, that a hearing on the above mentioned issues be heard on January 28, 1998 at 10:00 a.m.

By order of the Public Utilities Commission of New Hampshire this thirty-first day of December 1997.

/s/ Douglas L. Patch
Douglas L. Patch
Chairman

/s/ Bruce B. Ellsworth
Bruce B. Ellsworth
Commissioner

/s/ Susan S. Geiger
Susan S. Geiger
Commissioner

(7)

No. 00-852

Supreme Court, U.S.
FILED
DEC 28 2000
CLERK

IN THE

Supreme Court of the United States

DOUGLAS L. PATCH, BRUCE B. ELLSWORTH, and SUSAN S. GEIGER,

Petitioners,

v.

CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION ACTUALLY PRESENTED

The legal question that is actually presented under the filed-rate doctrine is as follows:

> Did the Court of Appeals properly hold that a state public utilities commission, having ordered a utility not to terminate wholesale power purchases under a tariff approved by the Federal Energy Regulatory Commission, must, under the filed-rate doctrine as enunciated in *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), permit that utility to recover its full wholesale power costs through its retail rates?

Contrary to the Petition, no question involving the Johnson Act, 28 U.S.C. § 1342, is properly presented. The Petition misstates the question presented by ignoring the fact that the New Hampshire Public Utilities Commission ordered respondent Connecticut Valley Electric Company to continue making wholesale power purchases from its parent, respondent Central Vermont Public Service Corporation, pursuant to a tariff approved by the Federal Energy Regulatory Commission, and expressly vacated its original order directing Connecticut Valley to terminate that wholesale power purchase arrangement.

RULE 29.6 STATEMENT

Respondent Central Vermont Public Service Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Connecticut Valley Electric Company is the wholly-owned subsidiary of Central Vermont Public Service Corporation.

TABLE OF CONTENTS

	Page
Question Actually Presented	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Counter-Statement of the Case	1
Statement of Facts	3
Central Vermont and Connecticut Valley Form One Power Supply System	3
The NHPUC's Restructuring Initiative	4
The RS-2 Rate Schedule	5
The NHPUC's Disallowance Order of December 31, 1997	6
Central Vermont's and Connecticut Valley's Claims in Federal Court and at FERC	7
The NHPUC's Direction to Connecticut Valley Not To Terminate the RS-2 Rate Schedule	9
The Irreparable Harm from the NHPUC's Actions	11

Contents

	Page
Proceedings Below	11
Reasons for Denying the Writ	17
I. The Petition Distorts the Grounds for the First Circuit's Decision.	17
II. The First Circuit's Decision Does Not Conflict with this Court's Decisions or with the Decisions of Other Circuits and Does Not Raise a Federal Legal Issue Requiring Review by this Court.	22
A. The First Circuit Properly Applied the Filed-Rate Doctrine.	22
B. The Johnson Act Was Not Violated.	23
C. There Is No Conflict among the Circuits.	24
D. The Petition Raises Only an Indisputable Factual Issue.	26
Conclusion	28

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Page

Cases:

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 16

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Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 26

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Page

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Public Serv. Co. of N.H. v. Patch, 962 F. Supp. 222 (D.N.H. 1997) 2

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Public Serv. Co. of N.H. v. Patch, 167 F.3d 29 (1st Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999) 2, 12, 20, 24

Public Serv. Co. of N.H. v. Patch, 202 F.3d 29 (1st Cir. 2000) 2, 10, 11, 13, 20

Public Serv. Co. of N.H. v. Patch, 87 F. Supp. 2d 57 (D.N.H. 2000) 2, 11, 13, 17, 27

Public Serv. Co. of N.H. v. Patch, 221 F.3d 198 (1st Cir. 2000) ..... *passim*

Cited Authorities

Page

Statutes:

Public Utility Regulatory Policies Act, 16 U.S.C. § 824a-3 3

Johnson Act, 28 U.S.C. § 1342 .....i, 23-24

New Hampshire Electric Utility Restructuring Act, N.H.R.S.A. §§ 374-F:1 to F:6 4

New Hampshire Limited Electrical Energy Producers Act, N.H.R.S.A. ch. 362-A 3

Other Authority:

Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, FERC Order No. 888-A, 78 FERC ¶ 61,220; 1997 FERC LEXIS 463 (March 4, 1997) 8

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents Connecticut Valley Electric Company ("Connecticut Valley") and Central Vermont Public Service Corporation ("Central Vermont") hereby oppose the Petition filed by the Commissioners of the New Hampshire Public Utilities Commission ("NHPUC") because (1) the Petition misstates the question presented and the holdings by the District Court and First Circuit, and (2) the decisions below are correct, create no conflict among the circuits, involve at most an indisputable factual finding, and raise no substantial federal issue requiring review by this Court.

COUNTER-STATEMENT OF THE CASE

This case arises from the NHPUC's attempt to restructure the New Hampshire retail electric industry from a traditional cost-based, regulated system to a competitive "retail choice" system. In doing so, the NHPUC has refused to recognize the federal rights of Connecticut Valley and its parent, Central Vermont, to recover the wholesale power costs they incurred to fulfill their obligations to serve their retail customers in New Hampshire. Connecticut Valley obtains the bulk of its wholesale power requirements from Central Vermont through a long-term wholesale power supply agreement, the RS-2 Rate Schedule ("RS-2") (Petition Appendix ("Pet. App.") 81-108), which the Federal Energy Regulatory Commission ("FERC") has approved. The NHPUC initially attempted to force Connecticut Valley to terminate that agreement on supposed prudence grounds so that Central Vermont, a Vermont-based utility, would have to absorb the "stranded costs" of the long-term power-purchase contracts it made to supply the power that Connecticut Valley needs for its New Hampshire customers. However, when Central Vermont filed a request with FERC for a federally authorized "exit-fee" to recover its stranded costs upon termination of the RS-2 Rate Schedule, the NHPUC switched positions, retracted its earlier order directing such termination,

and instead required Connecticut Valley to continue making such wholesale power purchases under RS-2. Nevertheless, despite its dramatic change in position, the NHPUC still refused Connecticut Valley full recovery of the RS-2 wholesale supply costs through its retail rates.

The District Court held that the NHPUC cannot have it both ways, that the NHPUC's retraction of its earlier order requiring termination thoroughly discredited the NHPUC's contention that Connecticut Valley's continuing RS-2 purchases were imprudent, and consequently found that there was no basis for an exception to the NHPUC's obligation, under the filed-rate doctrine and the Supremacy Clause of the United States Constitution, to allow Connecticut Valley to recover all the costs it has incurred under the FERC-approved rate schedule. *Public Service Co. of N.H. v. Patch*, 87 F. Supp. 2d 57, 64-65 (D. N.H. 2000) (Pet. App. 26-28) ("*Patch VII*").[1] The First Circuit, also grounding its decision on the NHPUC's change in position on RS-2 termination, affirmed. *Public Service Co. of N.H. v. Patch*, 221 F.3d 198, 202-203 (1st Cir. 2000) (Pet. App. 8-10) ("*Patch VIII*"). The NHPUC's petition for rehearing and rehearing *en banc* was denied. (Petition at 1)

Astonishingly, the Petition completely ignores the fact that the decisions below are based on the NHPUC's change of position on termination — notably, its ultimate position that the wholesale supply arrangement should remain in effect.

1. Respondents follow the shorthand references to the decisions in this case used by the First Circuit and the Petition. *Public Serv. Co. of N.H. v. Patch*, 962 F. Supp. 222 (D.N.H. 1997) (*Patch I*); *Public Serv. Co. of N.H. v. Patch*, 173 F.R.D. 17 (D.N.H. 1997) (*Patch II*); *Public Serv. Co. of N.H. v. Patch*, 136 F.3d 197 (1st Cir. 1998) (*Patch III*); *Public Serv. Co. of N.H. v. Patch*, 167 F.3d 15 (1st Cir. 1998) (*Patch IV*); *Public Serv. Co. of N.H. v. Patch*, 167 F.3d 29 (1st Cir. 1998) (*Patch V*), *cert. denied*, 526 U.S. 1066 (1999); *Public Serv. Co. of N.H. v. Patch*, 202 F.3d 29 (1st Cir. 2000) (*Patch VI*); *Public Serv. Co. of N.H. v. Patch*, 87 F. Supp. 2d 57 (D.N.H. 2000) (*Patch VII*); *Public Serv. Co. of N.H. v. Patch*, 221 F.3d 198 (1st Cir. 2000) (*Patch VIII*).

STATEMENT OF FACTS

Central Vermont and Connecticut Valley Form One Power Supply System

Connecticut Valley is a New Hampshire public utility that supplies electric power to approximately 10,000 customers in the Connecticut River valley along the New Hampshire-Vermont border adjacent to Central Vermont's service area in Vermont. Connecticut Valley, the smallest investor-owned utility subject to rate regulation by the NHPUC, is a wholly-owned subsidiary of Central Vermont, a Vermont public utility. Central Vermont and Connecticut Valley have supplied electric power to their New Hampshire customers for approximately 70 years, and for the last 50 as separate but affiliated companies. Connecticut Valley purchases approximately 76% of its wholesale power supply needs from Central Vermont under RS-2, an interstate wholesale requirements rate schedule authorized by FERC.[2] Connecticut Valley has purchased power from Central Vermont since it began operations in 1949, and it has purchased such power under RS-2 since 1982. (Affidavit of William J. Deehan, dated Jan. 18, 1999 ("Deehan Aff."), ¶¶ 2-9)

Central Vermont has continuously supplied Connecticut Valley with all the power (except what Connecticut Valley is required to take from QFs) and non-power services that its customers require as a slice of the consolidated system, with the two affiliates essentially operating as one entity. Central Vermont has always treated Connecticut Valley's retail load in New Hampshire as part of the consolidated system's native load which has been included in all of its power supply forecasts, plans and purchases. Consequently, Central Vermont has made substantial, long-term commitments for power supply resources

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2. The NHPUC requires Connecticut Valley to purchase the remainder of its power needs from high-cost "qualifying facilities" ("QFs") under the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 824a-3, and also under New Hampshire's Limited Electrical Energy Producers Act, N.H.R.S.A. ch. 362-A.

to serve the consolidated system's load, including Connecticut Valley's obligation to New Hampshire customers, at the lowest possible projected costs consistent with long-term reliability of supply. Under the FERC-approved RS-2 Rate Schedule (Pet. App. 81-108), Connecticut Valley is allocated its proportionate share of the costs of the consolidated system's power supply resources. Central Vermont supplies Connecticut Valley with such purchased power at cost, with no mark-up for rate of return or other measure of profit. (Affidavit of Bruce W. Bentley, dated Jan. 18, 1999 ("Bentley Aff."), ¶¶ 2-8, 21-22)

The NHPUC has consistently looked to Central Vermont to fulfill the duty to supply the necessary power for Connecticut Valley's New Hampshire retail customers subject to the NHPUC's regulation of the consolidated system's integrated resource planning.[3] With the NHPUC's encouragement and approval, therefore, Central Vermont and Connecticut Valley made long-term commitments for reliable power on a single-system basis. (Bentley Aff. ¶¶ 6-8, 21-22)

The NHPUC's Restructuring Initiative

This case involves the NHPUC's effort, pursuant to New Hampshire's Electric Utility Restructuring Act, N.H.R.S.A. §§ 374-F:1 to F:6, to change from the traditional cost-based regulatory system to competition. Central Vermont and Connecticut Valley have challenged the NHPUC's plan to shift to market-based rates because it fails to compensate them for the investments and long-term contractual commitments they made to fulfill their obligations to provide a reliable power supply for their New Hampshire customers.

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3. In 1992, for example, in approving Connecticut Valley's 1990 long-term power supply plan, the NHPUC stated that "[w]e have taken into account CVEC's affiliation with CVPS and that CVEC's LCIP [Least Cost Integrated Plan] filing reflects planning for the consolidated company." (Report and Order No. 20,450, in DE 90-053, Apr. 22, 1992; Bentley Aff. ¶ 13)

On February 28, 1997, the NHPUC issued its "Final Plan" in its Electric Utility Restructuring Docket (Order No. 22,514 in Docket DR 96-150) and related Orders for Interim Stranded Costs for each New Hampshire utility, including Connecticut Valley. As part of this package of orders, the NHPUC issued an Interim Stranded Costs Order (No. 22,509) that directed Connecticut Valley to cancel its wholesale power supply contract with Central Vermont, on the purported ground that Connecticut Valley had been imprudent in not terminating that contract. Simultaneously, the NHPUC denied Connecticut Valley recovery of stranded costs related to that wholesale supply contract.

The RS-2 Rate Schedule

Pursuant to the RS-2 formula, each year on or before December 1, Central Vermont makes a filing with FERC that includes estimated purchased power costs that it will include during the next year in the rate for the wholesale power Central Vermont supplies to Connecticut Valley. That same formula results in a corresponding adjustment of Connecticut Valley's retail rates. Connecticut Valley recovers only its cost of the power supplied by Central Vermont, earning no rate of return on that component, since the integrated company has always been viewed as responsible for service to New Hampshire. (Deehan Aff. ¶¶ 6, 47, 49-50; Pet. App. 81-108)

Connecticut Valley uses these RS-2 wholesale power charges as the primary input into its annual Fuel Adjustment Clause/Purchased Power Cost Adjustment ("FAC/PPCA") filing that it submits to the NHPUC. The purpose of the FAC/PPCA proceeding is simply to reflect the currently applicable purchased power costs for the retail rates in the upcoming year. Such updated cost filings are essentially ministerial matters that the NHPUC has routinely granted in their entirety or with only minor modifications. (Deehan Aff. ¶¶ 47, 50)

Central Vermont serves its annual FERC RS-2 filings on the NHPUC, and the NHPUC has the right to intervene before

FERC to question any Central Vermont cost data that will be incorporated in the RS-2 rate formula. The NHPUC intervened in the FERC RS-2 filing that Central Vermont made in December 1997, but never objected to any of the wholesale power costs that Central Vermont proposed to include in the RS-2 Rate Schedule. On January 13, 1998, FERC accepted Central Vermont's RS-2 filing applicable to prospective 1998 charges. (Deehan Aff. ¶¶ 51-54)

The NHPUC's Disallowance Order of December 31, 1997

Based upon the cost data in Central Vermont's FERC RS-2 filing, Connecticut Valley filed its annual FAC/PPCA cost adjustment proceeding for 1998 before the NHPUC on November 26, 1997. On November 17, 1997, the City of Claremont, New Hampshire had filed a complaint before the NHPUC seeking to reduce Connecticut Valley's retail rates. Claremont based its request solely on the NHPUC's Interim Stranded Costs Order (No. 22,509) in the restructuring docket holding Connecticut Valley imprudent for not terminating RS-2. (Pet. App. 109-116)

The Claremont complaint was consolidated with the FAC/PPCA rate case. At the December 17, 1997 hearing, the accuracy and foundation for Connecticut Valley's calculations supporting its FAC/PPCA rate adjustments were not challenged, nor was there any claim that the costs were not actually being incurred pursuant to RS-2. Claremont complained only that the rate was higher than what it believed to be the market price. No evidence regarding the prudence of the Connecticut Valley wholesale power supply contract with Central Vermont was introduced. (Pet. App. 110, 114-116)

On December 31, 1997, the NHPUC issued Order No. 22,815 (Pet. App. 109-119) freezing Connecticut Valley's rates at the 1997 level and repeating the holding in the restructuring docket that Connecticut Valley had acted imprudently by not terminating its purchases from Central Vermont and buying power on the spot market. The NHPUC

specifically cited the fact that Connecticut Valley had continued its RS-2 purchases "in disregard for the concerns" the NHPUC had raised in its February 28, 1997 Interim Stranded Costs Order directing Connecticut Valley to terminate RS-2. In fact, the NHPUC relied solely on that prior order entered in its restructuring docket, heard no evidence concerning the prudence of Connecticut Valley's continuing purchases from Central Vermont, and conducted no independent analysis of prudence.

Because of the serious procedural and substantive defects in the NHPUC's order, Connecticut Valley sought a rehearing, at which it produced substantial evidence demonstrating the prudence of its RS-2 purchases. (NHPUC Order No. 22,838, dated Jan. 20, 1998, at 2-3) However, the NHPUC never issued an order reflecting a reconsideration of its imprudence finding in light of all the evidence.

Instead, on February 23, 1998, the NHPUC stated its intent to impose an absolute cap, through a market price "proxy" of $.04 per kilowatt hour, on the FERC-authorized wholesale power costs that Connecticut Valley could recover through its retail rates. (Deehan Aff. ¶ 56) The NHPUC thus threatened that it would immediately switch Connecticut Valley from cost-based rates to market-based rates without regard to the financial consequences for Connecticut Valley or whether it could even stay in business. Connecticut Valley and Central Vermont immediately sought injunctive relief in federal court to avoid the irreparable injury that they would sustain from the NHPUC's imminent action.

Central Vermont's and Connecticut Valley's Claims in Federal Court and at FERC

To secure compensation for the stranded costs their integrated power system will sustain as a result of FERC's new open access transmission policies and resulting State restructuring initiatives, Connecticut Valley and Central Vermont have pursued simultaneous claims in this federal litigation and

through Central Vermont's request for an exit fee at FERC.[4] Connecticut Valley and Central Vermont, of course, do not seek duplicate recovery. Since they form one integrated system, Connecticut Valley and Central Vermont were compelled to pursue both proceedings to ensure that any procedural barrier in one proceeding would not defeat their right to compensation.

Both the constitutional claims that Connecticut Valley and Central Vermont have made in federal court to secure just compensation for their FERC-authorized wholesale supply costs and the exit fee Central Vermont has sought at FERC to recover those costs are based upon essentially the same underlying facts. Central Vermont's integrated system had a reasonable expectation that it would be able to recover the costs of the long-term wholesale commitments it made to secure reliable power that Connecticut Valley was legally obligated to supply to its New Hampshire retail customers. Central Vermont's exit fee request has proceeded to a full evidentiary hearing before an administrative law judge with respect to the duration of Central Vermont's reasonable expectations that it would continue to supply the wholesale power needed to serve Connecticut Valley's New Hampshire load, but no decision has yet been made.

Under FERC's procedures, the exit fee will be triggered immediately upon termination of RS-2. The exit fee will come into force on a provisional basis immediately upon termination, even though the proceeding at FERC would continue to

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4. An "exit fee" is the "charge that will be payable by a departing generation customer upon the termination of its requirements contract with a utility (if the utility is able to demonstrate that it reasonably expected to continue serving the customer beyond the term of the contract), whether payable in a lump-sum payment or on amortization of a lump-sum payment." *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, FERC Order No. 888-A, 78 FERC ¶ 61,220; 1997 FERC LEXIS 463 (March 4, 1997), at *55, n.571.

determine the ultimate amount of that fee. *See Patch VIII*, 221 F.3d at 202. Consequently, the NHPUC faced the prospect that at any time an exit fee would come into force upon Connecticut Valley's termination of RS-2 — precisely what the NHPUC was then demanding Connecticut Valley do. To forestall that result, the NHPUC reversed its position on termination.

The NHPUC's Direction to Connecticut Valley Not To Terminate the RS-2 Rate Schedule

The NHPUC based its imprudence finding in the restructuring docket on the RS-2 Rate Schedule's "evergreen" clause (Pet. App. 82), which it claimed allowed Connecticut Valley to terminate its wholesale purchases from Central Vermont upon one-year's notice with no obligation for stranded costs. The NHPUC's rationale for its imprudence finding was that Connecticut Valley could have given such notice and then obtained wholesale power on the open market as of January 1, 1998. The NHPUC relied upon the same rationale in later freezing Connecticut Valley's rates at their December 31, 1997 level and in stating that it would impose a market price cap on Connecticut Valley's wholesale power costs. (Pet. App. 117-118)

The RS-2 evergreen clause is also at the core of Connecticut Valley's and Central Vermont's claims in the District Court. The evidence they have submitted, and the undisputed public record, demonstrates that there never was any intent to allow an unconditional termination of Connecticut Valley's obligation to purchase its wholesale power requirements from Central Vermont regardless of the substantial, long-term commitments that Central Vermont entered into to obtain the power that Connecticut Valley needs for its New Hampshire customers. (Deehan Aff. ¶¶ 41-46) Indeed, the First Circuit has recognized the substantial

question raised by Connecticut Valley and Central Vermont concerning the meaning and effect of the evergreen clause:

> At best, the state agency may be exploiting a possible drafting mistake — the short-notice termination clause in the original contract between the two utilities — to shift to Central Vermont (or to Vermont ratepayers) what may well have been Connecticut Valley's prudently incurred costs of achieving long-term rate protection for its New Hampshire customers. *Patch VI*, 202 F.3d at 34; Pet. App. 65.

But the District Court held that it did not have to reach that substantial factual issue because, on July 22, 1998, the NHPUC, recognizing that Connecticut Valley's termination of RS-2 could immediately trigger the exit fee, reversed course and vacated that portion of its February 27, 1997 restructuring order that had directed Connecticut Valley to terminate its RS-2 wholesale power purchases from Central Vermont. (Order No. 22,986, July 22, 1998; Pet. App. 68-73) The NHPUC has expressly explained that this Order "clarif[ied] that CVEC [Connecticut Valley] should not terminate the RS-2 Rate Schedule if such termination would trigger the exit fee" for which Central Vermont has sought authorization from FERC. (Memorandum in Support of Defendants' Motion Summary Judgment, dated Jan. 19, 1999, at 9) The NHPUC has stated both to the District Court and the First Circuit that its July 22, 1998 order directs Connecticut Valley not to terminate RS-2 to prevent such termination from entitling Central Vermont to compensation for its stranded costs resulting from the loss of Connecticut Valley as a wholesale customer, which in turn would entitle Connecticut Valley to recover that exit fee through the retail rates paid by its New Hampshire customers. (Hearing Tr., Oct. 20, 1999, at 34; NHPUC Reply Br. in 1st Cir. No. 99-1974, at 6)

Through its switch in position on termination, the NHPUC sought to compel Connecticut Valley to continue to purchase

its RS-2 wholesale power requirements from Central Vermont even though its retail rates were frozen at a level that did not allow it to recover its full RS-2 costs.

The Irreparable Harm from the NHPUC's Actions

Central Vermont and Connecticut Valley submitted uncontradicted evidence to the District Court that the NHPUC's refusal to allow Connecticut Valley to recover through its retail rates the annual FERC-authorized RS-2 cost adjustments for the wholesale power that it purchases from Central Vermont threatened them with immediate irreparable financial harm. (Affidavit of James M. Pennington, dated Jan. 18, 1999) Based upon that evidence, the District Court issued a permanent injunction mandating Connecticut Valley's full recovery of its RS-2 wholesale power costs because "[n]o electric utility can long survive if its retail rates produce less revenue than it has to pay to purchase the power delivered to its retail customers." *Patch VII*, 87 F. Supp. 2d at 64; Pet. App. 27.

PROCEEDINGS BELOW

This case has proceeded on two tracks. The District Court from the outset has stayed implementation of the NHPUC's overall restructuring plan until the merits of all the plaintiff utilities' constitutional and preemption claims are fully decided. The First Circuit has affirmed that preliminary injunction on two separate occasions. *Patch IV*, 167 F.3d at 25-29; *Patch VI*, 202 F.3d at 32; Pet. App. 61.

Despite that stay of restructuring, the NHPUC has attempted to prevent Connecticut Valley from recovering its full wholesale power costs through its retail rates. On December 31, 1997, the NHPUC issued an order freezing Connecticut Valley's rates on the purported ground that its failure to terminate RS-2 was imprudent and stated its intent to restrict Connecticut Valley's recovery of wholesale costs to the current spot market prices. That order was based on the NHPUC's prior order in its restructuring docket — a proceeding that the District Court had

subsequently enjoined — denying Connecticut Valley any stranded cost relief. Given the irreparable injury they faced as a result of the NHPUC's rate-freeze order, Connecticut Valley and Central Vermont sought a preliminary injunction from the District Court requiring the NHPUC under the filed-rate doctrine to permit Connecticut Valley full recovery of its RS-2 costs. The District Court, perceiving the NHPUC's order as an "end run" around its stay of restructuring (Hearing Tr., Apr. 3, 1998, at 41-42), granted the preliminary relief sought because of the irreparable harm established by Connecticut Valley and Central Vermont. (Pet. App. 32-34)

The First Circuit vacated the preliminary injunction requiring the NHPUC to allow Connecticut Valley full recovery of its wholesale power costs on the ground that the NHPUC's purported prudence review was presumed to be a valid exercise of its authority over Connecticut Valley's retail rates and not an interference with FERC-approved wholesale rates. In an effort to balance the equities and limit the irreparable harm incurred until the merits of the plaintiffs' claims against restructuring could be resolved, the First Circuit permitted the NHPUC to lower Connecticut Valley's rates to those existing as of December 31, 1997. However, the Court of Appeals also said that any NHPUC attempt to lower the rates below that level would be subject to review by the District Court to determine whether such action violated its stay of restructuring. *Patch V*, 167 F.3d at 34-35; Pet. App. 45-48.

Upon remand, the NHPUC immediately cut Connecticut Valley's rates to their December 31, 1997 level and also sought to lower them further to recover the rate revenue obtained by Connecticut Valley in excess of that level after the preliminary injunction was granted and before it was vacated. (Order No. 23,168, March 22, 1999; Pet. App. 74-80) The District Court found that any reduction below the December 31, 1997 level would violate its stay of restructuring and therefore enjoined the NHPUC's attempt to do so. (Pet. App. 52-54)

On appeal, the First Circuit again found no basis for the District Court's preliminary injunction interfering with a presumptively valid state agency rate order. However, because fully briefed and argued cross motions for summary judgment were pending before the District Court and could provide the basis for a permanent injunction "requiring the Commission to allow cost pass-throughs of Central Vermont cost increases," *Patch VI*, 202 F.3d at 34, Pet. App. 66, the Court of Appeals did not vacate the District Court's order barring any reduction of Connecticut Valley's rates below the December 31, 1997 level, but instead remanded the matter for a decision within 90 days by the District Court on Connecticut Valley's and Central Vermont's request for such permanent relief.

On March 6, 2000, the District Court granted summary judgment to Connecticut Valley and Central Vermont on Count II of their complaint based upon the filed-rate doctrine.[5] *Patch VII*, 87 F.Supp.2d at 64-65, Pet. App. 26-28. The District Court held that the filed-rate doctrine preempted the NHPUC from disallowing the recovery of wholesale power costs that Connecticut Valley has incurred and continues to incur under the FERC-approved RS-2 Rate Schedule. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371-372 (1988). The District Court concluded that the NHPUC could not rely on its purported

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5. The District Court declined to decide the constitutional and preemption claims stated by that complaint because they closely resemble the claims made by co-plaintiff Public Service Company of New Hampshire ("PSNH") and thus could be affected by the proposed settlement between PSNH and New Hampshire. Moreover, a decision of such issues by the District Court could upset or delay that pending settlement. Accordingly, the District Court was considerate of, and deferential to, the State's efforts to settle with its largest utility. *Patch VII*, 87 F. Supp. 2d at 62, Pet. App. 22.

imprudence determination as an "escape hatch" from the filed-rate doctrine, making the express findings of fact that:

> On July 22, 1998, defendant *rescinded* its previous directive to plaintiff, contained in the Stranded Cost Recovery Order, to terminate the RS-2 Rate Schedule. See Order No. 22,986. This action was obviously based on defendant's desire to avoid the potentially severe adverse consequence of the purchase contract's termination, namely, the imposition of an exit fee on plaintiff [by FERC] that defendant would be required to pass through to New Hampshire retail customers. 87 F.Supp.2d at 64, Pet. App. 26 (emphasis in original).

The District Court saw that the NHPUC's "complete turnaround of its position regarding the desirability of contract termination completely undermines its rationale" for not permitting the recovery of wholesale power costs, and thus its effort to invoke the imprudence exception to the filed-rate doctrine. *Id.* The District Court, therefore, held that the NHPUC's actions were preempted because of "FERC's exclusive jurisdiction over the RS-2 Rate Schedule." The District Court further stressed that the NHPUC "cannot force plaintiff to live under the contract and disallow pass through of plaintiff's wholesale costs validly incurred pursuant to the RS-2 Rate Schedule." *Id*; Pet. App. 27.

Based upon its decision, the District Court issued a permanent injunction requiring the NHPUC to allow Connecticut Valley to recover all its RS-2 wholesale power costs through its retail rates. (Judgment and Permanent Injunction, entered March 21, 2000)

The First Circuit affirmed, holding that the NHPUC's July 22, 1998 order directing Connecticut Valley not to terminate RS-2 had eliminated the NHPUC's grounds for finding Connecticut Valley's RS-2 purchases to be imprudent:

> Of course, FERC has not ordered the state commission to do anything; it has merely allowed

Central Vermont to file a federal tariff (the RS-2 tariff) setting a rate for wholesale power sales to Connecticut Valley. But if the purchase is not improper, then the refusal of the state commission to allow the purchasing utility to pay the federal tariff rate, and include that cost in its own rates, is inconsistent with the federal scheme. The reason is that the rates set by the FERC tariff are binding unless and until altered by FERC. See Mississippi Power & Light Co., 487 U.S. at 371-74; Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 970, 90 L. Ed. 2d 943, 106 S. Ct. 2349 (1986).

Nevertheless, while the Supreme Court left the issue open, we held in Patch V that a state commission could disallow costs, even where they reflected payments required under a federal tariff, where the state agency had a colorable independent state ground for finding that the purchaser should not have made the purchase. 167 F.3d at 35; see also Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n. 837 F.2d 600, 608-09 (3d Cir.), cert. denied, 488 U.S. 941, 102 L. Ed. 2d 355, 109 S. Ct. 365 (1988). And, initially, the Commission did make a colorable ruling in its Disallowance Order that Connecticut Valley's continued purchasing from Central Vermont was imprudent, given Connecticut Valley's apparent opportunity to terminate its contract on one year's notice and switch to cheaper — albeit possibly short-term — power from other suppliers.

But faced with the threat of termination, Central Vermont then filed a tariff amendment that now threatens to impose a heavy termination charge on Connecticut Valley if it does cancel its contract. FERC (which more or less invited the amendment) has allowed the amendment to go into effect

> provisionally and, while FERC may in due course disallow the charge or reduce its amount, the amendment is in force for the time being. See 82 F.E.R.C. P 61,237, at 61,909 (1998) ("Central Vermont's proposed exit fee is hereby accepted for filing and suspended for a nominal period, to become effective on March 14, 1998, subject to refund. . . ."). Further, the state commission has now, in its Vacation Order, explicitly withdrawn the prior ruling that Connecticut Valley should terminate its requirements contract. In sum, the Commission's prior justification for disallowing the pass-through has evaporated. *Patch VIII*, 221 F.3d at 202; Pet. App. 8-9.

The Court of Appeals also rejected the NHPUC's contention that Connecticut Valley was imprudent for not terminating RS-2 before Central Vermont filed its exit-fee application with FERC. Given the one-year termination notice required under RS-2, Central Vermont could always have filed for an exit fee before RS-2 was actually terminated. *Id.* at 203; Pet. App. 10. Nor did the District Court's injunction requiring full recovery of Connecticut Valley's RS-2 costs run afoul of the "*Burford* doctrine," *Burford v. Sun Oil Co.*, 319 U.S. 315, 332-334 (1943), prohibiting federal courts from bypassing a state administrative scheme to decide state law issues and policy. The First Circuit explained that no state law issue was raised since the enforcement of the filed-rate doctrine is premised on the federal Supremacy Clause. *Patch VIII*, 221 F.3d at 203; Pet. App. 11. Consequently, the First Circuit held that "absent a colorable objective justification, the state agency may not disallow, in state rate-making proceedings, costs that were incurred under a federal tariff for a permissible purchase of wholesale power." *Id.* at 204; Pet. App. 11-12.

REASONS FOR DENYING THE WRIT

I. The Petition Distorts the Grounds for the First Circuit's Decision.

The District Court granted summary judgment to Connecticut Valley and Central Vermont on their filed-rate claim because the NHPUC's "complete turnaround of its position regarding the desirability of contract termination completely undermines its rationale" for finding Connecticut Valley's continuing RS-2 purchases imprudent. *Patch VII*, 87 F. Supp. 2d at 64; Pet. App. 26. The First Circuit affirmed for the same reason. Because of its July 22, 1998 order vacating its directive to Connecticut Valley to terminate RS-2, the NHPUC's "prior justification for disallowing the pass-through has evaporated." *Patch VIII*, 221 F.3d at 202; Pet. App. 9.

Despite this clear factual ground for the lower Courts' decisions, the conflict between the two NHPUC orders is not referenced either in the Petition's "Question Presented for Review" or in the Petition's section specifying supposed reasons for granting *certiorari*. Indeed, it is mentioned only once in the entire Petition in the following description of the District Court's decision:

> In its ruling, the district court reviewed the NHPUC's imprudence finding and determined that the NHPUC's Disallowance Order was preempted because it was not "sincerely . . . based on an imprudence determination." *Patch* VII at 64; App. 27. The district court apparently reached this conclusion by interpreting another NHPUC order issued July 22, 1998, in a separate docket, which was unrelated to the imprudence determination, as *prohibiting* CVEC from terminating the RS-2 Contract. *Patch* VII at 64; App. 27. (Petition at 5; emphasis in original)

When the Petition then describes the grounds for the First Circuit's decision, it entirely ignores the July 22, 1998 NHPUC

order and claims that the Court of Appeals relied merely upon Central Vermont's exit-fee application at FERC:

> This time, however, the First Circuit affirmed the district court, finding, upon review of the NHPUC's imprudence determination, that termination of the RS-2 contract "apparently would be self-defeating." *Patch* VIII at 202; App. 9. In affirming the district court, the First Circuit also found that NHPUC lacked a "colorable objective justification" for the Disallowance Order. *Patch VIII* at 204; App. 11-12. ***The First Circuit apparently based its determination on the application by CVPS before the Federal Energy Regulatory Commission ("FERC") for an "exit fee."*** The exit fee would impose, subject to refund, a termination charge on CVEC if it cancelled its contract. The First Circuit found that the imposition of the exit fee, and the prospect of a "potentially heavy financial penalty" caused the NHPUC's prior justification for disallowing the pass-throughs to "evaporate." *Patch* VIII at 202; App. 9. (Petition at 5-6; emphasis added)

That is manifestly *not* what the First Circuit held. The First Circuit's statement, quoted by the NHPUC above, that the basis for the imprudence determination had "evaporated" is part of that Court's holding that the NHPUC's July 22, 1998 order had eliminated the rationale for its imprudence finding. The NHPUC chose not to quote or even refer to the First Circuit's key statements italicized below:

> ***Further, the state commission has now, in its Vacation Order, explicitly withdrawn the prior ruling that Connecticut Valley should terminate its requirements contract.*** In sum, the Commission's prior justification for disallowing the pass-through has evaporated.

> *The Commission says on appeal that its Vacation Order only nullified its prior order requiring Connecticut Valley to terminate the contract and did not affirmatively order the utility to continue buying under the contract. The lack of an affirmative order is irrelevant: the RS-2 contract requiring purchases is binding on Connecticut Valley unless terminated; termination now apparently would be self-defeating because it would give rise to the prospect of a potentially heavy financial penalty that the state commission does not want; and so long as purchases from Central Vermont continue to be legitimately made under the contract, Connecticut Valley must pay the FERC tariff rate, and the state commission must allow it to reflect that rate in its own charges. Patch VIII*, 221 F.3d at 202-203; Pet. App. 9-10 (emphasis added; footnote omitted).

The NHPUC's distortion of the First Circuit's holding in an attempt to create an apparently compelling *certiorari* question violates this Court's fundamental expectation of candor and accuracy from any petitioner seeking to have its case heard. When a petition fails to provide all the pertinent circumstances underlying the question presented for review, a burden is imposed on this Court's time and resources given the vast number of *certiorari* petitions filed each year. As the Court said many years ago when it dismissed a case because of the parties' failure to provide all relevant factors underlying the decision under review:

> [W]e think it was incumbent upon counsel for both sides to see that the petition and reply thereto disclosed the real situation. The oversight has resulted in unfortunate delay and needless consumption of time.

> . . . Unless these [*certiorari* petitions] are carefully prepared, contain *appropriate references* to the record and present with *studied accuracy, brevity and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket.

Furness, Withy & Co., Ltd. v. Yang-Tsze Ins. Ass'n, Ltd., 242 U.S. 430, 433-434 (1917) (emphasis in original).

Here, the NHPUC has to the contrary made a "studied" effort to distort the First Circuit's ruling. The NHPUC argues that in *Patch V* and *VI* (authored by Judge Boudin) the First Circuit properly held that the District Court was required to defer to the NHPUC's imprudence determination, but that in *Patch VIII* (also authored by Judge Boudin) the Court of Appeals "without explanation, simply abandoned the limitations it had seemingly embraced" in its earlier decisions. Petition at 26. The NHPUC fails even to mention the First Circuit's discussion of the NHPUC's July 22, 1998 order vacating its directive to Connecticut Valley to terminate RS-2, and again erroneously attributes the First Circuit's decision to Central Vermont's mere filing of an exit-fee application at FERC. *See* Petition at 26-28. Thus, the NHPUC, intent on distorting what the First Circuit held, does not even challenge the Court of Appeals' interpretation of the NHPUC's July 22, 1998 order. Nevertheless, the First Circuit meticulously explained why it was required, as a matter of federal law, to determine whether the NHPUC's orders provided a justified reason under the filed-rate doctrine for not allowing Connecticut Valley full recovery of its

FERC-approved RS-2 costs. Citing *Howlett v. Rose*, 496 U.S. 356, 366 (1990),[6] the First Circuit stated that:

> [W]e are not concerned here with whether the imprudence finding is proper under state law but rather with whether, given its substance and context, it furnishes a basis for the state commission to ignore an otherwise controlling FERC tariff. In such cases, the "adequacy" of an asserted "independent state ground" is — indeed, under the Supremacy Clause must be — an issue of federal law. Burford does not license a state to ignore FERC tariffs merely by saying, without any present rational basis, that the purchase is "imprudent." This is so even if the Commission's "imprudence" finding has not been withdrawn and is still tolerated under state law.
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> Nor is it of any moment whether the Commission has, or has not, acted in good faith in refusing to allow Connecticut Valley to collect the

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6. *Howlett, id.* at 366 n.14, held that:

> [T]his Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds "fair or substantial support" in state law. See, e.g., Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 234 (1969); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 454 (1958); Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U.S. 537, 540 (1930). The reasons for that rule rest on nothing less than this Court's ultimate authority to review state court decisions in which "any title, right, privilege or immunity is specially set up or claimed under the Constitution." 28 U.S.C. § 1257(a); see Martin v. Hunter's Lessee, 14 U.S. 304, 1 Wheat, 304 (1816). "To hold otherwise would open an easy method of avoiding the jurisdiction of this court." Terre Haute & Indianapolis R. Co. v. Indiana ex rel. Ketcham, 194 U.S. 579, 589 (1904) (Holmes, J.).

> FERC tariff charges. Indeed, we assume throughout that the Commission is motivated simply by a desire to secure lower rates for New Hampshire consumers. But absent a colorable objective justification, the state agency may not disallow, in state rate-making proceedings, costs that were incurred under a federal tariff for a permissible purchase of wholesale power. *Patch VIII*, 221 F.3d at 203-204; Pet. App. 11-12 (footnote omitted).

By distorting the First Circuit's opinion to provide a false basis for challenging its decision as an inexplicable departure from its earlier rulings under the filed-rate doctrine, the NHPUC has done a disservice to the Court of Appeals which has, throughout these proceedings, given great deference to the NHPUC's orders, and also to this Court which must waste time on a Petition that is not candid and accurate and does not raise a substantial issue. The question which the NHPUC has raised for review is not properly presented, and accordingly the Petition should be denied.

II. The First Circuit's Decision Does Not Conflict with this Court's Decisions or with the Decisions of Other Circuits and Does Not Raise a Federal Legal Issue Requiring Review by this Court.

Once the grounds for the First Circuit's decision are properly understood, it is clear that there is no reason for this Court to grant review.

A. The First Circuit Properly Applied the Filed-Rate Doctrine.

The First Circuit's decision is fully consistent with — indeed, compelled by — this Court's filed-rate case law:

> In this case as in Nantahala we hold that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale

> price. . . Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Mississippi Power & Light Co. v. Moore*, 487 U.S. 354, 373 (1988), *quoting from Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965, 966 (1986).

The First Circuit correctly applied the filed-rate doctrine under these governing decisions. Once the NHPUC vacated its directive to Connecticut Valley to terminate its RS-2 purchases so that Central Vermont's exit-fee would not immediately become effective, Connecticut Valley's RS-2 purchases must be deemed legitimate. As the Courts below held, and as common sense and fairness dictate, the NHPUC cannot have it both ways by requiring Connecticut Valley to continue purchasing under RS-2 but denying full recovery of its RS-2 costs. By attempting to do so, the NHPUC plainly challenged the reasonableness of the FERC-approved RS-2 wholesale rates, which violates the holdings of *Mississippi Power & Light* and *Nantahala*.

B. The Johnson Act Was Not Violated.

The NHPUC admits that the Johnson Act is not violated if the state agency's order conflicts with a federal statute or federal agency determination. Petition at 7. However, the NHPUC fails to acknowledge the First Circuit's holding that the NHPUC's orders refusing to allow Connecticut Valley to recover all its wholesale costs violate the governing FERC-approved tariff. Instead, the NHPUC creates a "strawman" — that the First Circuit reviewed and reversed the NHPUC's state-law imprudence determination, which is impermissible under the Johnson Act. Petition at 27. The First Circuit did no such thing. Indeed, the Court of Appeals stressed that it was "not concerned" with the NHPUC's imprudence decision under state law.

Patch VIII, 221 F.3d at 203; Pet. App. 11. What the First Circuit did hold was that the NHPUC, as a matter of federal law under the filed-rate doctrine, could not order Connecticut Valley to continue its RS-2 wholesale power purchases under rates deemed reasonable by FERC, but then refuse to permit Connecticut Valley to recover all those FERC-approved costs through its retail rates. *Id.* The NHPUC order to which the First Circuit deferred was its order — issued 17 months after its imprudence determination — that vacated its directive to Connecticut Valley to terminate RS-2. Consequently, the question presented to this Court by the NHPUC is entirely bogus: Neither the District Court nor the First Circuit "reviewed" the NHPUC's imprudence determination, nor did those Courts violate the Johnson Act by enforcing the filed-rate doctrine.

C. There Is No Conflict among the Circuits.

By mischaracterizing the First Circuit's holding, the NHPUC attempts to create the appearance of a conflict among the Circuits on the validity of the so-called *Pike County* exception to the filed-rate doctrine. *See Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983). *Pike County* held that by questioning the prudence of a utility's purchases under a FERC-approved wholesale rate rather than the rate itself, a state agency did not violate the filed-rate doctrine. Although this Court has twice reserved decision on the validity of the *Pike County* exception, *Mississippi Power*, 487 U.S. at 373-374; *Nantahala*, 476 U.S. at 972, the Third Circuit, as well as the First Circuit in this proceeding, have accepted it. *See Kentucky West Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir.), *cert. denied*, 488 U.S. 941 (1988); *Patch V*, 167 F.3d at 35-36.[7]

7. Although the NHPUC contends that the Fifth Circuit also accepted the *Pike County* exception in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 911 F.2d 993 (5th Cir. 1990) ("*NOPSI IV*"), *cert. granted*, 499 U.S. 974, *cert. dismissed*, 502 U.S. 954 (1991), in fact the Fifth Circuit expressly said that "*Nantahala* established that (Cont'd)

However, contrary to the NHPUC's contention, the First Circuit in *Patch VIII* did not disavow its adherence to the *Pike County* exception, but found instead that the NHPUC's switch in position on RS-2 termination eliminated the factual basis for applying that exception:

> [W]hile the Supreme Court left the issue open, we held in Patch V that a state commission could disallow costs, even where they reflected payments required under a federal tariff, where the state agency had a colorable independent state ground for finding that the purchaser should not have made the purchase. 167 F.3d at 35; see also Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F.2d 600, 608-09 (3d Cir.), cert. denied, 488 U.S. 941, 102 L. Ed. 2d 355, 109 S. Ct. 365 (1988). And, initially, the Commission did make a colorable ruling in its Disallowance Order that Connecticut Valley's continued purchasing from Central Vermont was imprudent, given Connecticut Valley's apparent opportunity to terminate its contract on one year's notice and switch to cheaper — albeit possibly short-term — power from other suppliers. . . .
>
> [T]he state commission has now, in its Vacation Order, explicitly withdrawn the prior ruling that Connecticut Valley should terminate its requirements contract. In sum, the Commission's prior justification for disallowing the pass-through has evaporated. *Patch VIII*, 221 F.3d at 202; Pet. App. 8-9.

(Cont'd)
the *Pike Co.* line of cases did not apply to facts like ours; *Mississippi Power and Light* established specifically that they do not apply to our facts." 911 F.2d at 1001. *NOPSI IV* did not deal with the prudence of a utility's purchase of wholesale power, but instead addressed the question whether the New Orleans Council had properly refused to allow the utility to recover certain costs in its retail rates because the utility had failed to prudently diversify its power supply portfolio. *Id.* at 998-999.

The NHPUC's transparent attempt to create the appearance of an inter-circuit conflict must be emphatically rejected. As Chief Justice Taft cautioned long ago, only the presence of a real conflict justifies adding a case to this Court's crowded docket:

> It is manifest from this review of the conclusions in the two circuits . . . that they were really in harmony and not in conflict and that there was no ground for our allowing the writ of certiorari to add to an already burdened docket. . . . [I]t is very important that we be consistent in not granting the writ of certiorari except . . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 392-393 (1923).

D. The Petition Raises Only an Indisputable Factual Issue.

The only issue that the NHPUC could properly raise in this Court is factual: Did the NHPUC, through its July 22, 1998 order, direct Connecticut Valley not to terminate RS-2? The District Court found that the NHPUC had switched positions and no longer wanted Connecticut Valley to terminate its RS-2 purchases from Central Vermont:

> [A]n undisputed fact . . . summarily blunts defendant's position as a matter of law. On July 22, 1998, defendant *rescinded* its previous directive to plaintiff, contained in the Stranded Cost Recovery Order, to terminate the RS-2 Rate Schedule. See Order No. 22,986. This action was obviously based on defendant's desire to avoid the potentially severe adverse consequence of the purchase contract's termination, namely, the imposition of an exit fee on plaintiff that defendant would be required to pass through to New Hampshire retail customers. See id.

> . . . Clearly, defendant's complete turnaround of its position regarding the desirability of contract termination completely undermines its rationale for the Disallowance Order. Although the two orders were distinct, the Disallowance Order and the Stranded Cost Recovery Order were both based on the premise that contract termination in early 1997 was the desired course of action. The new order demonstrates that defendant no longer accepts this premise, and thus cannot sincerely claim that the Disallowance Order is based on an imprudence determination. However, defendant offers this Court no other rationale besides imprudence for its disallowance of the pass-throughs. *Patch VII*, 87 F.Supp.2d at 64; Pet. App. 26-27 (emphasis in original).

The First Circuit affirmed this factual finding. *Patch VIII*, 221 F.3d at 202-203; Pet. App. 7-10. Since an indisputable factual finding is hardly grist for this Court's mill, the NHPUC avoided raising in its Petition any question about the meaning and effect of its July 22, 1998 order. However, seeking *certiorari* through a distortion of the relevant facts plainly cannot be tolerated. When this Court in *Conway v. California Adult Authority*, 396 U.S. 107, 109-110 (1969), realized "that the actual facts simply do not present the issue for which certiorari was granted by us," it dismissed the writ of *certiorari* as improvidently granted:

> In this state of affairs we decline to adjudicate this case. Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court. *Id.* at 110. Here, clearly, it would be improvident to grant *certiorari* since the relevant facts and circumstances are simply not what the Petition represents them to be.

CONCLUSION

Because the First Circuit's decision is clearly correct and the Petition raises no properly presented legal issue remotely justifying this Court's discretionary review, respondents ask the Court to deny the Petition.

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No. 00-852

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

DOUGLAS L. PATCH, BRUCE B. ELLSWORTH, and SUSAN S. GEIGER

Petitioners,

v.

CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 3

A. CVEC's Characterization of NHPUC Orders and the Proceedings Below Is Demonstrably Wrong, Making All Of Its Arguments Fallacious 3

1. CVEC mischaracterizes NHPUC's orders and the opinions below 3

2. NHPUC's Order No. 22,986 does not Require that CVEC continue to make power purchases from its parent under the RS-2 Contract 6

3. Certiorari is appropriate in this case 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Appeal of Sinclair Machine Products, Inc., 126 N.H. 822, 498 A.2d 696 (1985) 7

Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F. 2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988) 5

Mississippi Power & Light, 487 U.S. 373, 108 S.Ct. 2428 9

Nantahala Power & Light, 476 U.S. 972, 106 S.Ct. 2349 9

Public Serv. Co. of New Hampshire v. Patch, 136 F.3d 197 (1st Cir. 1998) 1

Public Serv. Co. of New Hampshire v. Patch, 167 F.3d 15 (1st Cir. 1998) 1, 2

Public Serv. Co. of New Hampshire v. Patch, 167 F.3d 29 (1st Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999) 1, 8, 9

Public Serv. Co. of New Hampshire v. Patch, 202 F.3d 29 (1st Cir. 2000) 1, 2

Public Serv. Co. of New Hampshire v. Patch, 221 F.3d.198 (1st Cir. 2000) ..... *passim*

Public Serv. Co. of New Hampshire v. Patch, 173 F.R.D. 17 (D.N.H. 1997) 1

Public Serv. Co. of New Hampshire v. Patch, 87 F.Supp.2d 57 (D.N.H. 2000) 1

Public Serv. Co. of New Hampshire v. Patch, 962 F. Supp. 222 (D.N.H. 1997) 1

Statutes

Johnson Act, 28 U.S.C. § 1342 2

N.H. Rev. Stat. Ann. 374-F (1996) 6

I. INTRODUCTION

In the Petition for Writ of *Certiorari* (the "Petition"), the New Hampshire Public Utilities Commission ("NHPUC") demonstrated why the holding of the First Circuit in *Patch VIII*[1] created a conflict in the Circuit Courts of Appeal on an important jurisdictional issue compelling Supreme Court review. Rather than address those arguments in its Brief in Opposition, Respondent Connecticut Valley Electric Company ("CVEC" or "Connecticut Valley") misrepresents the record facts and mischaracterizes the proceedings below in an effort to transform the rationale of the First Circuit into something it finds preferable to the First Circuit's actual holding. By mischaracterizing the First Circuit's ruling, CVEC apparently believes it can deflect the Supreme Court's attention away from the First Circuit's serious departure from well settled jurisprudence under the Johnson Act, 28 U.S.C. § 1342, a departure that compels review and reversal by this Court.

With the possible exception of an increase in its rhetorical zeal, CVEC's tactic of misrepresentation of NHPUC orders and the breadth of favorable court rulings is typical of its advocacy in the proceedings below. Court rulings are not immune from CVEC's obvious overreaching.

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[1] The prior case shorthand utilized in the Petition for Writ of Certiorari is continued herein. *Public Serv. Co. of New Hampshire v. Patch*, 962 F. Supp. 222 (D.N.H. 1997) (*Patch I*); *Public Serv. Co. of New Hampshire v. Patch*, 173 F.R.D. 17 (D.N.H. 1997) (*Patch II*); *Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197 (1st Cir. 1998) (*Patch III*); *Public Serv. Co. of New Hampshire v. Patch*, 167 F.3d 15 (1st Cir. 1998) (*Patch IV*); *Public Serv. Co. of New Hampshire v. Patch*, 167 F.3d 29 (1st Cir. 1998) (*Patch V*), *cert. denied*, 526 U.S. 1066 (1999); *Public Serv. Co. of New Hampshire v. Patch*, 202 F.3d 29 (1st Cir. 2000) (*Patch VI*); *Public Serv. Co. of New Hampshire v. Patch*, 87 F.Supp.2d 57 (D.N.H. 2000) (*Patch VII*); *Public Serv. Co. of New Hampshire v. Patch*, 221 F.3d.198 (1st Cir. 2000), *Patch VIII*.

For example, CVEC was rightfully chastised by the First Circuit in *Patch VI*, where the court stated:

> In its brief and at oral argument, Connecticut Valley made clear that it thinks that the district court has assured the company *pendente lite* of its right to collect "its costs," a goal frustrated in part by this court's supposed failure to understand that cost recovery is the status quo that the district court has sought to preserve. However, what *Patch IV* and *V* sought to make clear is that no such assurance is valid; the district court's injunctive relief was sustained only against orders implementing the restructuring plan. If injunctive relief is to extend beyond such orders, it must be independently justified.

Patch VI, 202 F.3d at 33; Appendix to Petition for Writ of Certiorari at 63-64 (hereinafter "Pet. App. at ___").

The pattern of overreaching and mischaracterization in an effort to obtain its preferred result continues in CVEC's Brief in Opposition. All of the supposed counter-arguments raised in CVEC's Brief in Opposition rest upon a single, demonstrably false, premise – that the NHPUC ordered CVEC to continue purchases under the wholesale power contract with its parent (the "RS-2 Contract") approved by the Federal Energy Regulatory Commission ("FERC"). Once Connecticut Valley's false premise is exposed for what it is, it is clear that Connecticut Valley has no argument in opposition to those raised by the NHPUC in the Petition. Accordingly, as demonstrated in the Petition, the question presented is substantial, and the ruling of the First Circuit in *Patch VIII* has created a conflict between the Circuit Courts of Appeal on that substantial question warranting Supreme Court review.

II. ARGUMENT

A. CVEC's Characterization of NHPUC Orders and the Proceedings Below Is Demonstrably Wrong, Making All Of Its Arguments Fallacious.

1. CVEC mischaracterizes NHPUC's orders and the opinions below.

CVEC's Brief in Opposition attempts to depict a "trapping" situation by mischaracterizing two NHPUC orders. CVEC brazenly asserts on page after page that NHPUC has created a conflict with federal law by, in one order, disallowing certain claimed cost increases for purchases under the RS-2 Contract and simultaneously requiring CVEC to continue making purchases under the same RS-2 Contract by another order. Only half of this characterization is true. The NHPUC has disallowed certain cost increases on the grounds that CVEC acted imprudently in incurring them when less expensive alternatives were available. Order No. 22,815; Pet. App. at 109, the "Disallowance Order". However, the NHPUC has never mandated that CVEC make any purchases under the RS-2 Contract, nor has it forbidden CVEC from exercising its contractual right to terminate the contract. Nevertheless, in at least eight instances, CVEC's Opposition baselessly claims that the NHPUC has prohibited CVEC from terminating the RS-2 Contract. Curiously, after each recitation that "NHPUC ordered" continued purchases or that "NHPUC ordered" CVEC not to terminate purchases under the RS-2 Contract, CVEC fails to provide any citation to any NHPUC order supporting its characterization. The reason for CVEC's omission is simple; the characterization is untrue and there is no language in any NHPUC order compelling such purchases or prohibiting termination. [2]

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[2] CVEC's mantra begins early with the "Question Actually Presented" where it states "[NHPUC] having ordered a utility not to terminate

After misrepresenting the NHPUC's orders regarding CVEC, the company then argues that the misrepresented facts are the basis of the First Circuit's decision. However, the First Circuit's opinion made it clear that it was not based on CVEC's claim that the NHPUC had prohibited it from terminating the RS-2 Contract. The First Circuit specifically held:

The lack of an affirmative order is irrelevant:

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wholesale power purchase" and continues in the paragraph below where CVEC states "The Petition misstates the question presented by ignoring the fact that the New Hampshire Public Utilities Commission ordered Respondent Connecticut Valley Electric Company to continue making wholesale power purchases from its parent. . ." Brief of Respondent in Opposition at i (hereinafter Brief in Opp. at ___). The mischaracterizations continue on page 2 where CVEC states. . . ". . . and instead required Connecticut Valley to continue making such wholesale power purchases under RS-2." Brief in Opp. at 2. Connecticut Valley's bold headings are not immune from misrepresentation. "The NHPUC's Direction to Connecticut Valley Not To Terminate The RS-2 Rate Schedule. Brief in Opp. at 9. Slightly less emphatically "through its switch in position on termination, the NHPUC sought to compel Connecticut Valley to continue to purchase its RS-2 wholesale power requirements. . ." Brief in Opp. at 10-11. The misstatements of the First Circuit's holdings begin on page 14 where Connecticut Valley prefaces a correct quotation from the First Circuit with "the First Circuit affirmed, holding that the NHPUC's July 22, 1998 order directing Connecticut Valley not to terminate RS-2 had eliminated the NHUPC's grounds for finding Connecticut Valley's RS-2 purchases to be imprudent. . . Brief in Opp. at 14. Of course, neither that language nor its equivalent is found anywhere in the First Circuit's opinion. The misrepresentations continue with "The NHPUC cannot have it both ways by requiring Connecticut Valley to continue purchasing under RS-2 but denying full recovery. . ." Brief in Opp. at 23. "NHPUC. . .could not order Connecticut Valley to continue its RS-2 wholesale power purchasers. . . Brief in Opp. at 24. As noted above, all of these statements are patently false as NHPUC has never ordered CVEC to continue purchases under the RS-2 Contract or not to terminate the RS-2 Contract. See generally, NHPUC Order 22,986, Pet. App. at 68-73.

> the RS-2 Contract requiring purchase is binding on Connecticut Valley unless terminated; termination now apparently would be self-defeating because it would give rise to this prospect of a potentially heavy financial penalty that the state commission does not want.

Patch VIII, 221 F.3d at 202-203; Pet. App. 9-10 (emphasis added). This is the First Circuit's holding. It found the provisions of the NHPUC Order No. 22,986 (the "Vacation Order"), Pet. App. At 68-73, to be "irrelevant", and certainly not controlling of the issues presented to it on appeal. What it found to be important and controlling was its assumption that contract termination would be "self-defeating", presumably because of the potential costs associated with that termination in the form of an exit fee that FERC might allow. However, CVEC has never attempted to terminate its purchases from its parent nor shown that the cost of a termination fee would be higher than the savings from power purchases outside the contract. Such evidence, were it available, would presumably be adduced by CVEC to the NHPUC to demonstrate their prudence.

Thus, the First Circuit substituted its judgment, based on assumed facts, for the judgment of the NHPUC, leading that court to the conclusion that termination now, "apparently would be self-defeating because it would give rise to the prospect of a potentially heavy financial penalty that the state commission does not want." *Patch VIII*, *supra*; Pet. App. 9-10. That is where the First Circuit erred. The First Circuit lacks jurisdiction to enjoin a lawful state rate order based on what it perceives as an "evaporated" rationale for that order. *See Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F. 2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988). As detailed in the Petition, the Johnson Act limits the federal court's role to the determination of whether a

particular power purchase is required under federal law thereby creating a conflict between the state Disallowance Order and federal law. Without such a conflict, federal courts have no jurisdiction to enjoin the NHPUC.

2. NHPUC's Order No. 22,986 does not require that CVEC continue to make power purchases from its parent under the RS-2 Contract.

Despite CVEC's many misrepresentations to the contrary, nothing in the Vacation Order requires CVEC to continue to purchase power under the RS-2 Contract. See, Pet. App. 68-33. Likewise, nothing in the Vacation Order prohibits CVEC from exercising its contractual right to terminate the RS-2 Contract. *Id.* As noted in detail above, CVEC fails to cite to any language in the Vacation Order to support its characterization.

In reality, as can be seen from a review of the actual language of the Vacation Order and as is even more apparent when the context of the Order is considered, Order 22,986 simply removed the affirmative obligation to issue notice of termination of wholesale "requirements" contracts that NHPUC had previously ordered be given by three New Hampshire utilities with such contracts. The orders to terminate were issued as part of New Hampshire's plan to implement electric utility restructuring.[3] The orders were

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[3] Under New Hampshire's electric utility restructuring legislation, distribution and supply functions are separated. Electricity is sold by suppliers at unregulated, competitive prices with consumers free to choose their supplier. Distribution companies, like CVEC, continue to charge regulated, cost of service rates for the use of their distribution system. The Order to CVEC to terminate its RS-2 Contract was among other orders to terminate supply contracts in preparation for the commencement of competition. See generally, N.H. Rev. Stat. Ann. 374-F (1996).

based on the expectation that CVEC, and the other two utilities, would no longer need to purchase any power at all after the start of competition. The wholesale requirements contracts that existed between suppliers and the three New Hampshire utilities contained provisions permitting the contracts to be terminated upon specified notice periods. The NHPUC ordered the three utilities to exercise their termination rights in order to mitigate the amount of costs "stranded" as a result of a move toward deregulation.[4] The orders to terminate were thus unrelated to any consideration of whether any of the utilities had been imprudent in continuing to purchase under their supply contracts when less costly alternatives were available. On the contrary, the orders were premised on the expectation that the utilities would no longer purchase power for resale from any source.

Subsequent to its orders to the three utilities to give notice of termination of their wholesale requirements contracts, FERC rendered a decision which made it clear that termination of a wholesale requirements contract, like the RS-2 Contract, was probably unnecessary to mitigate stranded costs, since after restructuring the purchasing utility would simply have no requirements. *Id.* Pet. App. at 70-71. Accordingly, in the Vacation Order, the NHPUC vacated its directive to CVEC, and the two other New Hampshire utilities, to give notice of termination of their requirements contracts, because termination was no longer necessary to mitigate stranded costs.

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[4] CVEC had refused to comply with NHPUC's lawful order to provide notice of termination. Despite its refusal, CVEC was not found imprudent for disobeying the NHPUC's order but was found imprudent for not adhering to its state law obligation to pursue the least cost power supplies available. See Order 22,815, Pet. App. at 109; *Appeal of Sinclair Machine Products, Inc.*, 126 N.H. 822, 834, 498 A.2d 696, 705 (1985) ("The wholesale rate must be justified by the utility as the product of reasonable efforts to secure the lowest cost in light of appropriate alternatives available to the company.")

After issuance of the Vacation Order, the decision to terminate or not to terminate the RS-2 Contract rested solely with CVEC. Thus, the Vacation Order merely returned CVEC to the *status quo ante*, with the decision to continue making the purchases it needs prior to competition, or to cease those purchases, a matter of CVEC's prudence. Connecticut Valley has consistently chosen not to terminate the contract in the face of the Disallowance Order entered in December 1997. Pet. App. at 109.

Separate and apart from the fact that the Vacation Order fails to contain the prohibition on termination alleged by CVEC, Connecticut Valley's construction of the Vacation Order and its impact on the First Circuit's holding is nonsensical. The Vacation Order does not command CVEC to do anything. More importantly, to the extent CVEC persists in its mischaracterization of the Vacation Order and its effect on the First Circuit's rationale, NHPUC can simply rescind the Order eliminating what CVEC regards as the First Circuit's linchpin and the underpinnings of CVEC's entire argument in opposition to the Petition. Obviously, the First Circuit did not rest its opinion on such shaky ground. CVEC also fails to explain why the Vacation Order, which was in full force and effect and brought to the attention of the First Circuit prior to its ruling in *Patch V* (overturning the district court injunction of the Disallowance Order) did not control the First Circuit determination in that appeal. Clearly, the First Circuit's opinion hinges on what it perceives to be the wisdom of the Disallowance Order and NHPUC's concomitant imprudence finding, and is impermissibly based on the First Circuit's assumption of the costs of relevant alternatives.

As noted above, the Vacation Order had no effect on the First Circuit's holding; in fact it found it to be irrelevant. Its decision focused on termination of the RS-2 Contract and its unjustified assumption that termination would be more

costly than the alternatives. Such a determination is clearly prohibited under the Johnson Act.

3. Certiorari is appropriate in this case.

CVEC's hyperbolic attempt to create a factual and legal foundation for the First Circuit's ruling falls on its face. Once exposed for what it is, it is clear that CVEC has no cogent argument against *certiorari* in this matter.

Simply put, the First Circuit overstepped the bounds of the Johnson Act. As noted in the Petition, the First Circuit could legitimately review the NHPUC actions to determine if those actions were in conflict with federal law or FERC order. The First Circuit had already ruled in *Patch V* that no federal law or order required CVEC to purchase under the RS-2 Contract:

> It is arguable that the Commission [NHPUC] could not disregard a long-term commitment by Connecticut Valley if FERC had blessed a contract that contained such a commitment, *cf. Mississippi Power & Light*, 487 U.S. at 373-74, 108 S.Ct. 2428; *Nantahala Power & Light*, 476 U.S. at 972, 106 S.Ct. 2349; but here the contract filed with FERC itself contains a provision allowing Connecticut Valley to extract itself on one year's notice.

Patch V, 167 F.3d at 36; Pet. App. at 48. It did not change that finding in *Patch VIII*. Rather, the First Circuit effectively overturned NHPUC's Disallowance Order, not by finding a conflict with federal law but by finding the NHPUC's rationale for the Disallowance Order had "evaporated" and that termination was "self-defeating" because it assumed that the costs of termination would be greater than not terminating. Aside from the fact that there is

no record on which the First Circuit could base that determination, such a determination is expressly reserved under the Johnson Act to the state regulatory body with jurisdiction over the utility, here the NHPUC. The Johnson Act requires that the NHPUC be free to make its determination, subject to judicial review on the record by the appropriate state courts, and not be preempted from making that determination by inappropriate federal court interference.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

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